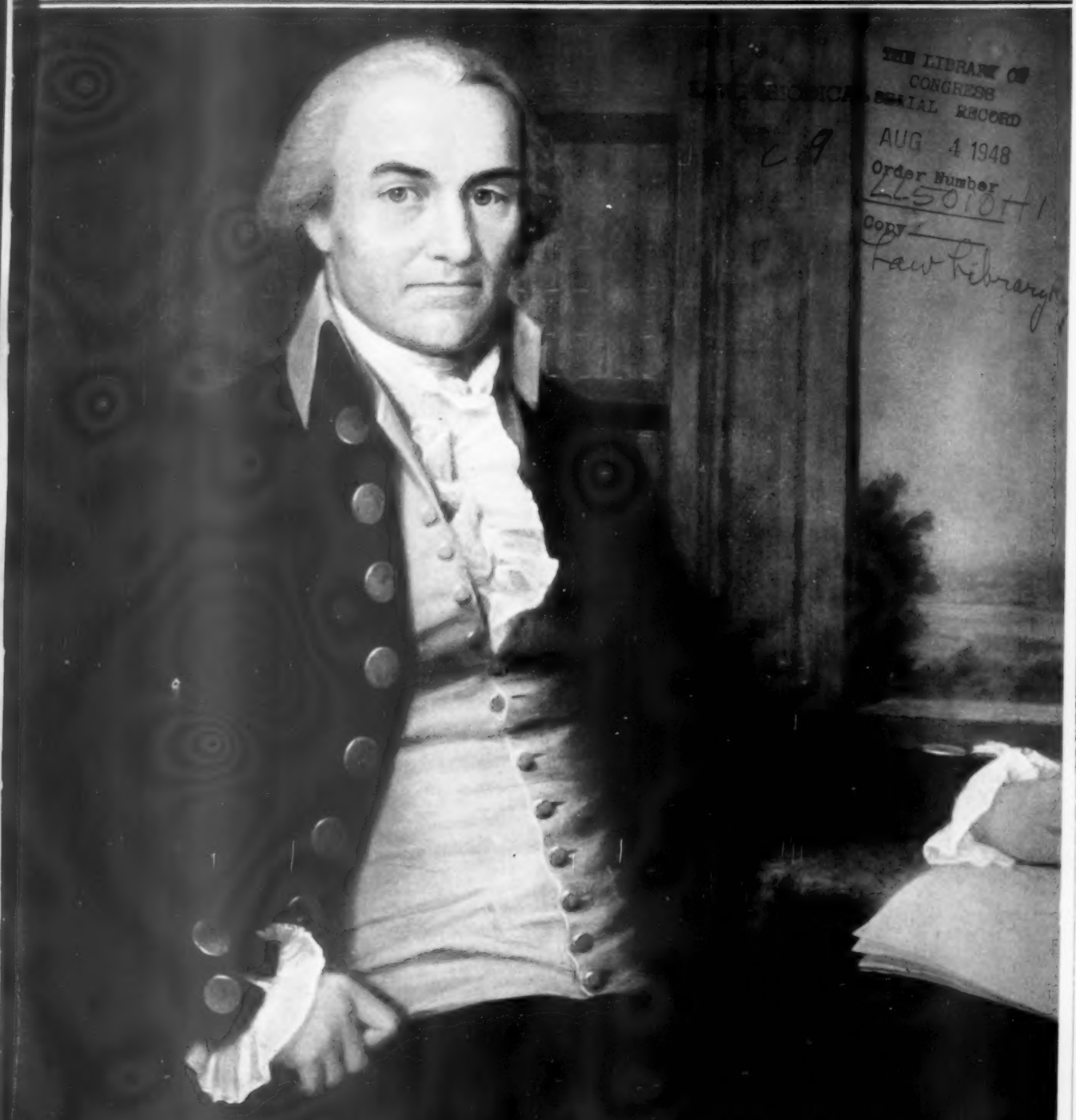
# AMERICAN BAR ASSOCIATION JOVRNAL

May 1941





OLIVER ELLSWORTH

THIRD CHIEF JUSTICE OF THE UNITED STATES
1796 to 1800

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**Our Cover**—Oliver Ellsworth occupies a large place in American Law and Jurisprudence. Some hint of his importance in the roll of great lawyers is given at another place in this issue. The picture on the cover is a reproduction of the painting by Earle.

**Law in the Western Hemisphere**—President Jacob M. Lashly was one of the outstanding guests at the meeting of the Inter-American Bar Association in Havana, in April. His address before that meeting, printed at another place in this issue, was widely commended in the press, and will be read with interest.

**Justice — More Equal and More Exact**—The profession is always the richer whenever Judge John C. Knox, of New York, writes an article for lawyers. His article in this issue of the Journal is most timely and discusses a matter of major interest.

**Lawyers in Nazi Germany** — The condition of lawyers in present-day Germany is intolerable. The article in this issue by Mr. Herzberg is authentic and revealing. We get a sad picture of the future of the profession wherever the Nazi "new order" may exist.

**Patents and National Defense** — Prior to the Great War of 20 odd years ago, the German Chemical industry and its processes had made great inroads into our industrial economy. Patents for these processes were all taken over by our Government and later were sold to American owners. The importance of Inventions and Patents in an emergency like the present can hardly be overestimated. The article in this issue by Professor Fenning is both timely and significant and is written in an attractive style.

**Illustrated Articles** — The story about *"The Procedure and Protocols of Presidential Inaugurals"* in the January issue, with its rare views of early inaugurations, proved to be one of the most widely read articles the Journal has printed in some time. The article was widely copied in the press and was generally commended as a piece of *res-gestae* evidence, showing the strength of Democracy in America. We are still getting requests to reproduce its text and its historical pictures.

*"The Homes of the Supreme Court —Past and Present,"* in this issue, we believe will attract a similar response. It has been prepared with care, and with considerable effort and expense in securing rare and unusual pictures and in presenting them in an attractive and artistic fashion. The purpose has been to produce an authentic record for the future, as well as to furnish an interesting and readable article for the present.

**Format and Type-Face**—In the summer of 1920 when the monthly Journal was being projected, considerable study and attention was given to questions of format, type-face, etc., for the new publication. The job was so well done that it proved adequate for two decades.

During recent months, similar study and research have again been given to the matter of format and type-face. One of our expert advisers on typography said in substance:

> "You on the JOURNAL have a responsibility to provide your readers with the best there is in modern typography; first, because it means greater ease in reading and, second, because your readers are an unusual class and you will find they are especially sensitive to good printing."

The management of the Journal accepts that statement of responsibility, and is attempting to carry it out.

**International Law or International Chaos**—The "rules of the game" between nations, which the world (down to a few years ago) justly called International Law, comprised a system which was slowly built up during the last five or six hundred years. It grew up by a kind of adhesion process, rather than by specific commitments. The medieval Italian City-States were the first to work out a code comparable to modern International Law. The countries of northern Europe at first refused to recognize these customs and usages and continued to base their international relations on the idea that might makes right. In opposition to this theory, Hugo Grotius, a Dutch jurist, in 1625, published his famous work, *"De Jure Belli Ac Pacis."* Grotius' work established International Law as a recognized body of rules accepted by practically all sovereign states as a guide in their relations with each other. For about 300 years the basic doctrines of International Law were gradually developed and came to be respected by all nations. In the first World War some of the rules broke down because both sides insisted that they were not suited to the changed conditions existing in modern war, principally war at sea. But it has remained for Nazi Germany within the last few years to destroy International Law, in the sense that the world has come to know it. They have revived the doctrine that "Might makes Right" as the prevailing rule in international relations. The address of Attorney General Jackson, in this issue, discusses the effect of this Nazi atavism, or reversion to ancestral type; and is a momentous pronouncement on how the United States views this repudiation of international decency. It is also a forthright statement of how this country has met this challenge.

# STRENGTH...

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AMERICAN BAR ASSOCIATION

MAY, 1941 JOVRNAL VOL. 27, No. 5

# CURRENT EVENTS

## Administrative Law Bills

THE SEVERAL BILLS—designed to improve the procedural situation in the operation of the federal administrative agencies and in taking appeals from them—are now in what might be called the slow-motion stage of formal legislative action. Which is to say that the hearings are in process before the sub-committee of the Senate Judiciary Committee on this whole subject. The sub-committee is giving its specific attention to the three Senate bills already introduced, viz.: S. 675, sometimes called the "Majority" bill, being the bill presented by the Attorney General's Committee; S. 674, which has been referred to as the "Minority" bill, being the views of the so-called "minority" of the Attorney General's Committee; and S. 918, which combines some of the features of its several predecessors, including the Logan-Walter Bill.

A bill which has been introduced in the House, H. R. 3464, is more like S. 674 than either of the others. No hearings are scheduled, as yet, by the House Committee, it apparently being the intention to avoid duplicating the efforts of the Senate Committee. Perhaps hearings will later be held by the House Committee.

The hearings now in process before the Senate sub-committee will probably run until the middle of May or later. The witnesses being heard, and to be heard, may be divided generally into three groups: (1) those from Government agencies and departments, (2) the academic or "expert" witnesses, and (3) practitioners before the administrative agencies, along with private persons and organizations. It has been the practice so far, to hear all persons expressing a desire to testify on this subject.

To date, the witnesses have been chiefly members of the Government departments and agencies. As a result, the record so far made indicates a preponderance in favor of S. 675, with some expressions of the view that S. 674 would hinder the work and programs of the several agencies. No good purpose can be served in attempting to predict what kind of bill will be finally enacted.

The members of the Senate sub-committee conducting the hearings are: Senator Carl A. Hatch, of New Mexico, Chairman; and Senators Joseph C. O'Mahoney, of Wyoming; Albert B. Chandler, of Kentucky; Warren R. Austin, of Vermont; and John A. Danaher, of Connecticut.

## Board of Governors Meeting

THE SPRING meeting of the Board of Governors of the Association will be held at the Mayflower Hotel in Washington, May 5. The meeting precedes the annual meeting of the American Law Institute, which will also be held at the Mayflower, May 6 to 9. During this same week the Council of the Section of Insurance Law, the Council of the Section of Mineral Law, the Council of the Section of Municipal Law, and the Council of the Section of Real Property, Probate and Trust Law will also meet.

## American Law Institute

THE NINETEENTH annual meeting of the American Law Institute will be held at the Mayflower Hotel, Washington, D. C., May 5 to 9. The events on the program include:

Monday evening, May 5—Reception to members and guests and their ladies.

Tuesday, 10 A. M., May 6—Address by President George Wharton Pepper

Report of Director, William Draper Lewis

Report of Adviser on Professional Relations, Hon. Herbert F. Goodrich

The Chief Justice has been invited to address the Institute at the Tuesday forenoon meeting.

Tuesday afternoon, Wednesday and Thursday and Friday will be devoted to consideration of the Tentative Draft of Evidence, the Final Draft of Security, the Tentative Drafts of Judgments, and the Final Draft of Criminal Justice—Youth. The annual dinner will be at the Mayflower Hotel, Thursday evening, May 8. On Friday, May 9, there will be a reception at the White House for the ladies accompanying members and guests of the Institute.

The JOURNAL expects to give some further attention to the Institute meeting in a later issue.

## Richmond Regional Conference

EIGHT ATLANTIC Seaboard States sent representatives to the ABA Regional Meeting at Richmond, Va. April 7. The gospel text for several speakers, including President Lashly and Judge John J. Parker was "The Lawyer's Part in National Defense." The states represented were New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Virginia, North Carolina and South Carolina. Robert T. Barton, Jr. of Richmond, a member of the ABA Committee on National Defense, described the important work of that Committee. Lewis F. Powell, Jr. of Richmond, Chairman of the ABA Junior Bar Conference, presided at a regional meeting of the members of the Junior Bar.

The Conference was the sixth Regional meeting held under the auspices of the ABA Section of Bar Association Activities, of which Burt J. Thompson, of Iowa, is Chairman.

## Memphis Regional Conference

A REGIONAL CONFERENCE of State and local Bar Association Executives from 8 states, (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Tennessee and Texas), was held at Memphis, Tennessee, April 3rd.

The presiding officer at the meeting was Fred S. Hutchins of North Carolina, member of the Council of the Section of Bar Organization Activities. A full and interesting discussion of the various phases of organized bar activities was had. Addresses were delivered by Edmund Ruffin Beckwith, Chairman of the Association's Committee on National Defense and Hon. John J. Parker, Chairman of the Committee on Improving the Administration of Justice. In the evening a dinner was held in honor of President Jacob M. Lashly.

The Memphis meeting served to emphasize the interest in and the significance of these Regional Conferences. They are coming to be one of the prime activities of the Association's work.

## University of Michigan Law School 1941 Law Institute

FOLLOWING its successful Law Institutes of the past two years, the University of Michigan Law School has arranged for a third annual institute to be held in the Law Quadrangle at Ann Arbour on Monday and Tuesday, June 23 and 24.

The topics to be covered this year are torts, taxation, oil and gas law, and accounting. The treatment of torts will be limited to some of the more recent problems confronted in the practice of law. The discussion will be led by Professor Paul A. Leidy, who has made the subject his specialty for many years. Taxation will be handled jointly by Professor Paul G. Kauper and Dean E. Blythe Stason. The subject of oil and gas law will be presented by Mr. James A. Veasey of the Tulsa, Oklahoma bar, one of the country's leading authorities on that subject. He will limit his treatment to problems of oil and gas law of general interest to all practicing lawyers. The subject of accounting will be discussed by Mr. George D. Bailey, Detroit resident partner of the accounting firm of Ernst & Ernst.

The quarters of the Law Quadrangle will be available to the guests of the Institute. The registration fee of ten dollars includes cost of a room for the two nights and the annual banquet. Reservations may be made and further information secured by addressing Dean E. Blythe Stason, Hutchins Hall, Ann Arbor, Michigan.

## The Association of American Law Schools

ONE OF THE law journals which is too much neglected by practicing lawyers is the *American Law School Review*. Frequently topics are discussed in that journal which are of large interest to the practicing lawyer and cannot readily be found any other place. The Editor, Mr. S. E. Turner, probably knows more law school professors and teachers in an intimate way than any other lawyer in the United States. The APRIL issue has just come to hand. It contains among other things a "Symposium on Civil Liberties," being the discussion on that topic which took place at the meeting of the American Law School Association in Chicago last December. The Symposium was participated in by Hon. Francis Biddle, Solicitor General of the U. S., Professor Harry Shulman of Yale Law School, Professor Herbert Wechsler of Columbia University Law School, and Professor T. Richard Witmer of Yale Law School. It also contains the Committee Reports and the transcript of proceedings of the meeting of that Association. Incidentally it may be stated that any practicing lawyer who has the privilege of attending some of the "Off the Record" smokers and other pleasant activities of the Association of American Law Schools will come away feeling that he wants to go again whenever he is invited. The more serious parts of the program of the Association frequently discuss in an acute way topics of keen interest to the profession. An illustration of this was the round-table discussion on "Property and Status" and specifically on "The Drafting of Wills and Trusts" which took place at the December meeting. The discussion was led by Professors W. Barton Leach and A. James Casner of Harvard Law School, and was participated in by Carl H. Zeiss of the Chicago Bar, Vice-President and General Attorney, Northern Trust Company, and Walter T. Fisher of the Chicago Bar.

Some of the Committee Reports of the Association Meeting are abstracted elsewhere in this issue.

## Law Books Again

ONE OF THE vital topics in which lawyers all over the United States are interested is the matter of law books. The April issue of the *American Law School Review*, which is just at hand, contains an extended report of the Committee on

Legal Publications and Law Reporting, presented at the December meeting of the Association of American Law Schools. It points out that there are three major committees working along parallel lines in a study of the law book situation: "The Parent Committee" of the American Bar Association, headed by Professor James E. Brenner of Stanford University Law School; "The Committee of the American Association of Law Libraries," headed by Gilson G. Glasier, Librarian of the Wisconsin State Library; and the "Committee of the American Law School Association," of which Professor Arthur S. Beardsley of the University of Washington Law School is chairman. In its comment the committee says among other things:

> "As pointed out in the previous reports of your committee, the hope for certain reforms in these problems must rest with the bar, who are the ultimate consumers, and whose personal interests far outweigh those of the law schools or the law school libraries . . . The attorneys represent a large buying power and it is through them that most of these problems must be settled."

The report refers to the surveys which were undertaken by the American Bar Association committee under the chairmanship of Professor Brenner. [The latter report and these surveys are discussed at length in the December issue of the JOURNAL, under the title "Law Books and Lawyers."]

## Summer Session of Practicing Law Institute

THE PRACTICING LAW INSTITUTE will conduct its fourth annual Summer Session of lectures and clinics for practicing lawyers during the two weeks commencing July 14. The Institute brings together lawyers from all parts of the United States. Last year 115 lawyers practicing in 67 cities in 27 states gathered in New York City to spend two weeks in concentrated study of the latest methods of practicing law.

The Summer Session is conducted in comfortable air conditioned quarters at the Hotel Astor. Courses meet for two hour periods from 9 A. M. to 10 P. M. with recesses for luncheon and dinner. Last year the program consisted of 13 courses totalling 241 hours of instruction. The program is so arranged that at each period throughout the day two or three different courses are going on, affording a choice of programs to those attending.

The most popular courses were those on taxation. This year the following tax courses will be given (2 hours being devoted to each of the courses daily): Fundamentals of Income Tax Law, Tax Practice, Excess Profits Taxes, Current Problems in Taxation. Thus a lawyer may devote 8 hours a day for the two weeks period to the study of taxation. It is believed that this is the most extensive program in taxation offered in any school.

Another popular field is trial work. Courses of 2 hours each will be given daily in each of the following subjects: Preparation for Trial and Trial Technique, Trials Clinic, Negligence, Medical Aspects of Personal Injury Actions and Public Speaking.

Labor Law is another popular subject. Ten timely lectures on various aspects of labor law will be given by recognized experts on that field.

HAROLD P. SELIGSON
Institute Director

## Appeal for French Lawyers

*Somewhere in France, March 22, 1941*

I AM MAKING an appeal to the American Bar Association on behalf of the members of the French Bar.

The disorganization of life in France, following the occupation of nearly half its territory, has been disastrous to all, but to lawyers, perhaps, more than any other class of French citizens. Leaders of civic and national thought in their communities, it is easy to understand that they were forced to leave their homes and their offices before the onrush of an invading army.

Before I left Paris I was told by a friend, a member of the Bar of Paris, that, in one of the southern towns in France he had seen one of the most distinguished jurists of a northern city in a line of refugees waiting for his portion of soup for himself, his wife (who was too ill to come) and his two young children. Is it not possible for the American Bar Association to show some feeling of fraternal concern and aid their French brethren in this day of their great need in some slight way?

On several occasions I have had the honor to represent the Presidents of the American Bar Association in France. I am now acting as the official delegate of the Association in the Union Internationale des Avocats. Accordingly I feel that I am the one to make this appeal to my fellow American lawyers on behalf of our French colleagues.

The kind of aid, the form of aid, I leave to you, knowing full well that if anything can be done, it will be done.

Respectfully,
PENDLETON BECKLEY,
[*American Lawyer, practicing in France*]

[*The above letter was received by the Journal through the agency of Dean John H. Wigmore, a well-known friend of the French Bar.*]

## "Lawyer–Client–Public"

[*The "Chicago Bar Record" is the monthly journal of the Chicago Bar Association. It is one of the most progressive and most widely quoted Bar Association publications in the United States. Its editor is Mitchell Dawson who is the author of the article from which we print the following item. It gives the sound objectives of proper press-relations by the Organized Bar. It shows how those objectives may be helped toward achievement by an alert and vigorous and readable law journal.* ED.]

THE JOB of interpreting Association activities and objectives through the printed word has not been confined to releasing news to the local press. In planning our public relations program we realized that we had another effective medium for reaching and influencing lay as well as bar opinion through the Association's magazine. Anyone who takes

the trouble to go back through the earlier volumes of the *Chicago Bar Record* will be impressed with its vitality and value to the Association from its inception. It has also always held some interest for lawyers in other parts of the world and for a few law-minded laymen. But it was not until 1934 that a conscious effort was made to use it as a medium for interpreting the Association to a much wider audience.

We have tried to accomplish this in three principal ways. First, we have sent the *Record* to key people in civic, business and labor organizations, in the hope of interesting them in some of the things we are trying to do. Every leader in other fields whose attention is thus caught, even though only slightly, may be the means of spreading the word further.

Secondly, we have used the *Record* to supplement our press releases. Advance copies of the magazine go out every month to the city editors of the local newspapers with a memorandum calling attention to particular articles which might make copy for a news story.

And lastly, we have endeavored to make a livelier and more readable magazine out of the *Record* by increasing the range and variety of its contents without losing sight of the primary function of the magazine as a vehicle for reporting Association activities and a medium for the exchange of opinion among its members.

## "The Next Things to Do"

By Carl B. Rix*

[*From April, 1941 issue Journal of American Judicature Society*]

THE SCENE was a luncheon in a large room in the building of the Supreme Court in Washington. A remarkable gathering was present from all parts of the country; the director of the administrative office of the United States courts and his aides, judges, educators and lawyers, all devoted to one cause—improvements in the administration of justice. These men had a common purpose and they had met at that place because of that purpose. Mr. Henry Chandler, the director of the administrative office, reported on the work under his direction, the great gains under the new plan, the improvements in a great system of courts. Eminent judges and lawyers spoke briefly of work which had been done Justice Edward R. Finch, Chief Justice of the New York Court of Appeals, was called upon. Out of years of splendid accomplishment, of service as a leader in a great cause, he was entitled to speak of things which had been done. He said simply that he had been thinking "of the next things to do."

The Justice knew, because of the lasting work which he and his associates had done, of years of study and formulation of plans, of exchange of experiences and devotion to a cause, a mighty movement was under way in every part of his country. His vision made him speak only "of the next things to do."

The unattainable of years had been attained. The dreamed-of things were in actual practice. Solutions of new problems of administrative agencies were in process. Yet he could think only of the next things to do.

Complacency, self-sufficiency, indifference to existing conditions, tolerance of known abuses, had no place in the life of that eminent judge. He had shown by his life that he never shared in those. He was looking ahead—to "the next things to do."

In a world of war, of shifting concepts of government, of social obligations, it is inconceivable that our system of justice should not be affected by such forces. To meet them known abuses cannot be tolerated, known defects must be eradicated, known methods of improvement must be adopted and made to work.

In Mr. Frank Grinnell's recent article (Jud. Soc. Journal, February, 1941) is found this quotation from Justice Holmes:

> "The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole and say to myself, he has done his part to help."

All over the country, actuated by that purpose, lawyers are building improved structures like those in Arizona and Colorado; they are meeting the challenge to our institutions; they are meeting the simple commendation of the great Justice, "he has done his part to help."

To aid in that cause, to lead men on in every community, no matter how small a sphere, there is the inspiration of leaders like Chief Justice Finch, who can survey calmly "the next things to do."

*Of the Milwaukee Bar; Director of Am. Jud. Soc.; Board of Governors, Am. Bar Ass'n.

## American Judicature Society

THE annual meeting of the American Judicature Society will be held May 7 at the Mayflower Hotel in Washington. As is customary the Society holds its meeting when many of its members are in Washington for the annual sessions of the American Law Institute. Attorney General Robert H. Jackson will be the principal speaker before the Judicature Society. The Secretary of the Society is Herbert Harley, of Ann Arbor, Michigan. David A. Simmons, of Houston, Texas, President of the Society, will preside at its meetings.

## Evaluation of Text Books

THE COMMITTEE of the Law School Association make a significant recommendation with respect to text books when it says:

> "Believing that the bar is of the opinion that annually more text books are being published than the profession can economically absorb, and that there are many poor ones included in this number; that these text books are often heavily padded, and hastily prepared in a wasteful competition that increases the cost to the consumers, and that the problem, although difficult, is not beyond hope of remedy at least in part, your committee again recommends a plan which proposes a critical examination and review of text book manuscripts by an impartial board appointed by the American Bar Association. It would be the duty of this board to evaluate the quality and the need of the proposed publication with a view of improving the character of the books planned for publication and to cut down unnecessary and wasteful duplications."

## Unauthorized Practice of Law

THE COMMITTEE on Unauthorized Practice of Law held a most important meeting during the mid-winter meeting of the House of Delegates in Chicago. Among the more important matters considered, and on which action was taken, were the following:

### 1. *Legal Advice over the Radio*

As a result of complaints received from bar associations, the Committee is seeking to induce the broadcasting stations in the United States, by agreement among themselves or in some other practicable way, to agree that hereafter a radio program should neither give or offer to give legal advice, nor by title or substance represent or lead the public to believe that it emanates from a court or is a part of the judicial system.

The Committee believes that the use of the word "court" in radio programs results in a misrepresentation of the judicial process over the air which is apt to lessen the respect for the administration of justice.

### 2. *Legal Publications*

A conference was held with authorized representatives of Prentice-Hall, Commerce Clearing House, Alexander Publishing Co., Research Institute of America, and United States Law Week for the purpose of considering and arriving at a cooperative understanding with respect to the following matters:

a. The danger to the public of legal advice from lay publishers and publications on specific individual legal problems, which is an entirely different question from information about legal matters generally.

b. The danger to the public of having the services of lawyers furnished by legal publishers as part of their service in connection with such individual problems, if and when such lawyers are the employees of or responsible to the publishers rather than the client.

c. The danger to the public of the increasing tendency to represent to the public that the informative news services are a complete answer to their legal problems, and the advertising policy of therefore dissuading the public from seeking competent disinterested legal advice for its individual problems.

The publishers evinced every desire to cooperate with the Committee with respect to these matters, and it is expected that something constructive will be accomplished by mutual agreement.

### 3. *Real Estate Brokers*

The practice of law by real estate brokers was discussed at a well attended session, at which were present, besides the Committee, representatives of the Ohio State Bar Association, Cuyahoga County (Ohio) Bar Association, Illinois State Bar Association and Chicago Bar Association. The Committee's aid and assistance to local and state bar associations in this field will be to the fullest extent possible, as far as permitted by the by-laws of the Association.

### 4. *National Conference Group*

The members of the Committee, together with representatives of the American Bankers Association Trust Division, constituting the National Conference Group, had a full day meeting at which great progress was made in aiding in the bringing about of definite agreements between corporate fiduciaries and the bar. Through the cooperation of the National Conference Group, such an agreement has been drafted and is now pending in the State of Oregon and progress is being made toward a better understanding between the bar and the corporate fiduciaries in the States of Iowa and North Carolina. The conference with respect to these matters was attended by representatives of other state and local bar associations.

### 5. *Conference Committee on Adjusters*

Serving on this Conference Group are representatives of the insurance and adjusting interests who speak for companies writing ninety percent of the insurance business in the United States; serving on the Committee also are three members of the Association's Standing Committee on Unauthorized Practice of Law. A statement of principles approved by the companies has heretofore been widely circulated throughout the country, which contains many provisions that are highly in the interests of the public and the bar. At this meeting of the Committee, an Interim Report of its activities was approved for transmittal to the Board of Governors of the Association.

### 6. *Federal Administrative Procedure Bill*

The Committee, as a result of its study and consideration of the Federal Administrative Procedure Bills, has recommended in a report which has been submitted to the Board of Governors that no administrative agency should, by its rules, permit a person not a member of the bar in connection with his practice before it, to perform acts or services which constitute the practice of law; and further that if any person other than a lawyer makes it a business or practice to represent other persons before an administrative agency in matters involving questions of law, he should be deemed guilty of a misdemeanor. It is the Committee's view that if there is to be a general statute respecting federal administrative procedure, that the same protections against unauthorized practice of law should be contained therein that are provided by legislation in most of the states.

### 7. *Cooperation with Section on Bar Organization Activities*

Throughout this year, the Committee has arranged for the delivery of reports of its activities to the various Regional Conferences held under the auspices of the Association. When members of the Committee cannot attend, they have asked other representatives of the Association to deliver these reports.

EDWIN M. OTTERBOURG
Chairman.

# LAW IN THE WESTERN HEMISPHERE*

By HON. JACOB M. LASHLY
President, American Bar Association

THE AMERICAN BAR ASSOCIATION is grateful for the privilege of participating in this conference and for the opportunities which it shares with the other members of the bench and bar of the Western Hemisphere to cement old and begin new relations, firmly grounded in mutual interest in the things of the law. Its implications and outlooks are thrilling and captivating. Here in the warming auspices and amidst the charming influences of the beautiful city of Havana, we are together in the fellowship of the law—the science and practice of justice, equality and the essential elements of fairness between man and man.

### Purpose of the Law

The end and purpose of law is to guide and govern people in their relations with each other so that they may live together in organized society without conflict. "Liberty under law" is a familiar phrase to lawyers. It intimates that men may have individual liberties to go about their normal affairs as freely as they choose so long as they do not injure or unduly oppress the other members of society. It is the function of law to determine when the exercise of individual liberty is going beyond its proper bounds and to define and declare the interests and rights belonging to society.

Law is a fundamental and strategic element of the active, highly developed and progressive society which exists in the Western Hemisphere. Law accompanies the business man to his desk, the statesman to his assembly, the worker to his bench, the banker to his vaults, even the doctor to his patient, the musician to his platform and the priest to his altar. Every phase of life is affected, either visibly or invisibly, to a greater or less degree, by the regulations of society; and these regulations are law, whether enacted or traditional.

Society and civilization are on the move; they do not stand still even for a single instant. Law must and does move with them. Whether by case or code, it reaches out and seeks to find new devices, new tools and new ways to aid civilization in its progress and to meet the changing demands and needs of a constantly modernizing society.

It is not surprising that the law may appear at times to falter, or, in temporary confusion actually to fail in its broad purposes. The demands made upon it by the ingenious minds which ever thrust our frontiers forward are exceedingly exacting and sometimes quite appalling. But the law is flexible, and like a river which flows to the sea, sometimes flooding and sometimes dry, sometimes finding a well defined channel and at other times spreading over great distances in its search for an outlet, it moves onward, impelled by the forces of nature, washing the shores of life and energizing the enterprises of men.

This forward movement of the law is especially visible to us of the Inter-American Bar Association. Even now we are seeing the peoples of the Western Hemisphere coming together into constantly closer and more comfortable relations.

The normal and natural development of civilization in all of the countries of this hemisphere, coupled with improved and increased means of communication among them, has set in motion a stream of intercourse which has only been quickened by the threats and pressures of foreign wars.

### Civil Law and Common Law Compared

As increasing business, and the more intimate cultural and social relationships among us improve and grow, it becomes the task of the law to assist this development by finding new forms and new methods to carry out the desires of men within the fundamental canons of public order and fair play. The growth of the law is a source of intense interest to those of us gathered here because, as it occurs, we can see at close range the two great legal systems of the world, the Civil Law and the Common Law, each striving to adjust itself to a meeting with the other. Here Las Siete Partidas of the Latin Republics reach across the channel of the centuries to clasp the hand of Magna Charta and to embrace the living organism which is the body of the Common Law of the North American countries. There is no difference in the ultimate aims and goals of the two systems of jurisprudence. Their common objectives are justice and order; and life made reasonably secure, happy and free.

The Civil Law represents the composite desires of Society, gathered together by direct processes into a code or structure of laws, compliance with which would accomplish the common will. On the other hand, the Common Law is built more indirectly—upon relationships: the duties and obligations which naturally flow from the positions which people have assumed with regard to each other. The body of the law emerges from judicial determinations of the rights and duties which spring from these relationships. It is inevitable that the gradual interpretations by the courts of statutes, codes or rules promulgated by government or governmental agencies should erect upon the Civil Law additions which in their nature are made to conform to the patterns of the Common Law. Upon the other hand, it is the practice of the North American countries and states to assemble judicial expressions proceeding from a multitude of experiences of litigants into codes, statutes, and rules, and thus to codify the body of the common law.

*Address delivered at the First Annual Conference of the Inter-American Bar Association, Havana, Cuba, March 25, 1941.

### Task of Lawyers

Under either system the machinery by which common right and the substantive moods of the people are translated into definitive action for their governance, that is, the rules of procedure, are largely left to the legislative process. In either instance there is no especial difficulty in the subjective or substantive law. It will be kept reasonably abreast of the progress of peoples, through the demands of the times and the acts of the legislative or other lawmaking bodies which are compelled to record the popular will. It is in the field of adjective law and procedural rule for the effective control and application of the substantive law to the needs of the people that the greatest skill is required. The technical knowledge requisite for this work is rarely found in legislative bodies—it is a task for lawyers. The rights of men cannot be vindicated or expressed in terms of justice unless an appropriate and effective procedure shall have been provided to introduce them into the streams of life. It would be as though a man owned a large tract of rich land and had been supplied with an abundance of fertile seed for the planting, but was without farm machinery or implements with which to prepare the soil, plant the seed, or cultivate the growing crops. Or it might be as though he were compelled to use the primitive implements of ancient times. Unless the adjective law and procedural rules are made adequate to the progress of modern conceptions of justice and fairness among men, there is little advantage in possessing a competent idea of the fundamental rights of man. Should the rules of procedure fail to act with reasonable certainty or with fair speed, so as to effectuate the purposes of the people through the judgments of the courts, their will and their rights may be as completely thwarted as though they had not made known or expressed their wants and needs in legal provisions. Here is both the obligation and the opportunity of the bench and the bar. There are no other persons and there are no other groups qualified, or so well qualified, to see to it that the machinery of justice is new, modern and efficient.

### Purpose of Bar Organization

The fundamental purpose in bar organization lies in the necessity to integrate and concentrate the forces of the members of our profession to attain a unit impact which will enable them more effectively to render public service in these times of crisis and great need. We are living in an era of groups, and mass movements. The progress of science and invention in the fields of communication and transportation has made it convenient for those with similar interests to associate themselves together, so as to give weight and driving power to the demands of their respective groups for material advantage or social benefits for their members. In this play of interest by organized power blocs, many of the sacred individual rights of men, previously regarded as the objects of especial solicitude upon the part of government, have had to be surrendered in order to gain a share in the benefits obtained by the groups with which they have identified themselves. There are gains to be secured through these means, undoubtedly. Material ends often are successfully promoted and social ambitions frequently are measurably realized. There are losses too, which must be taken into account—losses in the fields of individual independence and personal dignity; losses in the development of self-reliance, private conscience, and religious faith.

We have not come to appraise the values of these movements and trends nor to attempt any predictions as to their eventual issue. But a recognition of their existence constrains us to two conclusions: first, lawyers also must be unified and solidified into compact groups in order to accomplish any noteworthy improvements in the administration of justice; second, there is no material gain or selfish interest which the lawyer group might hope to promote through organization: in the very nature of things, its only possible objective would be a more effective public service. To these ends, for these purposes, and upon account of these conditions, the bar associations of the Western Hemisphere are on the march. They have declared, and do now declare, their determination to strengthen the bonds of affiliation for the development of group awareness among the men and women of the bench and bar.

The organized bar has in mind a very definite picture which it desires to hold up that all may see. It is that of the relation of attorney and client. With the outline of this relationship and the position of the parties everyone is familiar. A person, threatened with loss or injury to himself or his property, seeks the advice and services of a lawyer. Because of the lawyer's expert knowledge and experience and because of the confidence which is felt in his integrity and ability, he is retained, and the relation of attorney and client is then and there established. The client expects and has the right to expect, that his lawyer will bring to bear in his behalf all of the skill, ability, integrity and courage which he may possess, for the defense of his rights and the accomplishment of the ends of justice in his cause. So it is in the case of the associations of lawyers. The organized bar has accepted the public as its client. The composite skill, integrity, and courage of its members are here being mobilized in the defense of the rights of its client to the end that *justice* may be made available and the people made strong in the possession of this priceless treasure.

### Confusion and Leadership

As I have travelled about the United States within the past half year and spoken with many of the members of our profession and with men and women of all degrees and walks of life, I have been impressed (and depressed somewhat as well) by the confusion of mind and will to be found among them in these dangerous

times. Clearly it is the task of lawyers, who are closer to the formulation and interpretation of laws and the management of governmental affairs than others, to create out of the many suppressed desires for cooperation, some clear aims.

From out the midst of the confusion, chaos and anarchy which preceded the achievement of the independence of the Western Hemisphere from the dominance and oppressions of foreign regimes there emerged such heroic figures as San Martin, Bolivar and Washington, warriors and statesmen whose leadership and example have furnished high incentives and noble patterns for liberty loving peoples everywhere for more than a century of time. We humble ourselves before the shrine of their greatness. Their spirit is imperishable and will continue to exalt our motives and to reprove our failures. In speaking of Justice Holmes at the age of ninety, Justice Cardozo then of the Supreme Court of the United States, said:

> "In those hours of discouragement to which not even experience is a stranger, I feel at moments the same doubt, paralyzing effort with its whispers of futility. The distrust is shamed and silenced by the vision of a great example."

Possibly the most serious problem which confronts the western world in recent times is a certain loss of faith among the people. Faith in God and the eternal verities; faith in their country and their Government as an instrument of justice and a place of opportunity; faith in themselves as the owners and managers of a good world. There can be no doubt that there is a great desire among all the nations of this Hemisphere for cooperative justice and peace. While no one of us would be strong or influential enough to change the rushing course of events and trends, it can be expected of the men of the Bar that collectively they will apply their trained minds, their habits of independence and courage, to crystallize the manifest desires of the American peoples into clear justice and peace objectives. This is one of those things which the stronger and wider organization of the Bar will enable us to do.

The American Bar Association was organized in the year 1878 at a meeting attended by sixty-nine lawyers of the United States. Today there are more than one hundred thousand members of the Bench and Bar of that country joined together under that title, either in direct membership or by delegate representation, for the accomplishment of the high purposes of the profession which were set forth by that little group of founders in a short and simple statement of their aims and goals.

"Its objects shall be to advance the science of jurisprudence," they said, "promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar."

It is a singular circumstance that the men who were writing these objects and purposes more than half a century ago should have made their provisions broad enough to include the "members of the American Bar." They could not have foreseen that we who have been given the privilege to carry forward the lantern of their ideals and their plans should be standing here today on this beautiful island, the meeting ground between the North Americas and the Latin Americas, engaged in these historic exercises, but it is stimulating to feel that their vision and their prescience were comprehensive enough to embrace the lawyers of all the Americas and to encourage cordial intercourse among them. Perhaps even now their spirits brood over us as the movement which they launched becomes identified with the Inter-American plan which is designed to bring all American lawyers into contacts of greater intimacy and frequency.

While we shall continue to draw inspiration from the courage and character of the great men of the past, it will be borne in mind that the responsibility lies heavily upon us as a professional unit, not only to consolidate the advantages already at hand, but also to foresee and prepare for the future needs of our countries and our peoples in the reconstruction period which is to come to the peoples of all the world. Liberty and justice will go with us from here as we return to our homes, made more realistic and certain through the spirit of renewal which characterizes our Conference and enters so strongly into our resolutions.

A great North American author, George Santayana said, that the human spirit is a flame, the body is a candle. The color, clarity and direction of the light which the flame sends out will depend upon the environment and circumstances in which the candle burns. In the last analysis what counts, and the only thing that really does count is the intensity and purity of the flame. In the preparation of the circumstances and the environment; in keeping intense, strong and pure the flame—a passion for justice and triumphant law—the Inter-American Bar will find mission and opportunity.

### Friendships

There is yet another reason which, even if standing alone and excluding all of the other considerations to which I have made reference, would justify the exertions and satisfy the hopes of those, who like myself, think that the Inter-American Bar Association is destined for a useful and enduring experience and service. It is that of the contacts which are made and the friendships which are to be formed in the course of the development of its work.

In something more than twenty-five years in which I have been identified with Bar Association activities, I have enjoyed the fellowship of many of the brightest minds in my own and other countries and have drawn inspiration from some of the richest and deepest souls which could be found in any fellowship among any people, in any age. It has been my privilege and pleasure to observe others also in the first acquaintance, the ripening appreciation, and finally the most enduring friendships which have sprung from the kinship in culture and the mutuality in interests and tastes which always characterize the men of the law. These attractions are not confined to any particular Bar Association or to any country, or to any language. Cooperation and friendship, like love and loyalty, are the same in any country, are the same in any tongue.

# INTERNATIONAL ORDER*

By HON. ROBERT H. JACKSON

Attorney General of the United States

THE FOUNDING of this Association, at a time when so much of the world either has lost or has forsaken government under law, bears witness to our faith in a civilization ordered by reason rather than by force. We are debtors to this captivating country and city, not only for a generous hospitality, but more importantly for an inspiring leadership. We lawyers from the United States value this opportunity to compare our own legal philosophy and institutions with those of other American commonwealths. You have no doubt been impressed with our modest habit of expounding our own law by a recital of some case we won.

Every delegate comes to this council with pride in his own national institution and tradition. No one comes to capitulate to any other. Each of our pioneering peoples of this hemisphere has looked to one or another of the old world civilizations to fertilize its intellectual life. Since communion with Europe has been interrupted we have turned to each other for cultural enrichment. We are rediscovering the Americas. Of course this has its perils. I am told that in Washington the old and the young of both sexes are making a furious study of the Spanish and Portuguese languages. We trust that you good neighbors will bear with your characteristic good humor the punishment that is in prospect for your native tongues.

The easy and fraternal terms on which our profession meets, serve to emphasize the discord of the world and above vexing national problems rise grave questions of law relating to our international well being.

### Need for Just and Forceful International Order

We are haunted by the greatest unfinished task of civilization which is to create a just and peaceful international order. If such a relationship between states is to be realized, we know its foundations will be laid in law, because legal process is the only practical alternative to force.

The state of international law and of progressive juridical thought on the problems of states not actually participating in hostilities is of more than academic interest in a world at war. The United States feels obliged to make far-reaching decisions of policy. I want the legal profession of this hemisphere to know that they are being made in the conviction that the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization. There may be differences of opinion as to some of its particular rules, but we have made conscientious effort to square our national policy with enlightened concepts of the law of nations viewed in its entirety.

### Policy of the United States

It is the declared policy of the Government of the United States to extend to England all aid "short of war." At the same time it is the declared determination of the Government to avoid entry into the war as a belligerent.

The question has been raised whether the two aspects of this dual policy are reconcilable with law, or whether such comprehensive aid, extended to one belligerent party to the express exclusion of the other, is incompatible with the obligations which international law imposes upon a state, not a belligerent in the war.

President Roosevelt in his Message to the Congress of January 6, 1941, said that "Such aid is not an act of war."

Secretary Hull and Secretary Stimson have voiced similar conclusions and the Committees of both Houses of Congress are committed to the same view.

But weighty names and even heavier texts are found to contend that our only legal alternatives are to enter the war ourselves or to treat all belligerents with impartiality. It has been asserted that international law forbids the United States to exchange over-age destroyers for air and naval bases in this hemisphere, and forbids us to render acts of assistance to a belligerent with whose institutions and cause we feel some kinship, and who has been subjected to aggression.

### Old Rules of Neutrality Now Superseded

I do not deny that particular rules of neutrality crystallized in the nineteenth century and were codified to a large extent in the various Hague Conventions which support this view. But the applicability of these rules has been superseded. Events since the World War have rejected the fictions and assumptions upon which the older rule rested. To appreciate the proper scope of that doctrine of an impartial neutrality we must look to its foundations. Its cornerstone is the proposition that each sovereign state is quite outside of any law, subject to no control except its own will, and under no legal duty to any other nation.

### Foundations of Old Neutrality Rules

From this it is reasoned that, since there is no law binding it to keep the peace, all wars are legal and all wars must be regarded as just.

This doctrine is stated by a standard authority:

> ". . . it would be idle for it [international law] to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions . . . International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." [Hall's *International Law* 5th Ed., 1904, p. 61]

It is easy to see how an international law which holds all wars to be legal, and all warring nations as possessed of equal rights, arrives at the conclusion that neutrals must not discriminate between belligerents.

### Unrealistic and Cynical Assumptions

To the mind untutored in such sophisticated thought it seems to be characterized by more of learning than of wisdom. It does not appear to be necessary to treat all wars as legal and just simply because we have no court to try the accused. That hypothesis seems to justify President Wilson's statement that "International Law has perhaps sometimes been a little too much thought out in the closet." Certainly the work-a-day world will not accept an unrealistic and cynical assumption that

*Address before Inter-American Bar Association, Havana, Cuba, March 27, 1941.

aggression, by a state that had renounced war by treaty, rests on the same basis as defense against an unprovoked attack in violation of treaty.

### Discrimination Between Warring States

I think it was Henry Adams who complained that he was educated in one century and was living in another. All of us, even some of our international lawyers, suffer the same dislocation of ideas. The difference is that Henry Adams recognized it. Some of our scholarship has not caught up with this century which, by its League of Nations Covenant with sanctions against aggressors, the Kellogg-Briand Treaty for renunciation of war as an instrument of policy, and the Argentine Anti-War Treaty, swept away the nineteenth century basis for contending that all wars are alike and all warriors entitled to like treatment. And this adoption in our time of a discriminating attitude towards warring states is really a return to earlier and more healthy precepts.

### Just and Unjust Wars

The doctrine of international law in the seventeenth and eighteenth centuries was based on a distinction between just and unjust wars. From that distinction there was logically derived the legal duty of members of the international society, bound by the ties of solidarity of Christian civilization, to discriminate against a state engaged in an unjust war—in a war undertaken without a cause recognized by international law. That duty was stressed by the scholastic writers in the formative period of the law of nations. It was voiced by Grotius, the father of modern international law. There was, in his view, no duty of impartial treatment when one of the belligerents had resorted to war in violation of international law. Writing in 1625, he said: ". . . . it is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war . . ."[1]

### Interlude in International Law

It may be argued that the nineteenth century and the first two decades of the twentieth witnessed an interlude in international law inconsistent with what went before and also with what was to follow. But if I read history correctly, there has seldom, if ever, been a long period of time during the past three centuries when states, for their own self-defense or from other motives, have been completely impartial in relation to the belligerents. More often than not, at the end of wars, there have been recriminations of such activities, which have thereafter been largely overlooked. The testimony of historians as to the practice of states in the seventeenth, eighteenth and nineteenth centuries should not be overlooked by the international lawyer in so far as the real limits of the principles of neutrality are concerned.[2] It is safe to assert that the absolute category of neutrality on the one hand, and belligerency on the other hand, will not square with the test of actual state practice, and that, as judged by that practice, there is a third category in which certain acts of partiality are legal even under the law of neutrality.

### American Practice of Discrimination

Even during the vogue among publicists and text writers of the theory that all wars were just and all neutrality therefore undiscriminating, modern practice —especially American practice—shows instances of discriminating, qualified neutrality. During the World War, after the United States had declared war on Germany, a number of Central and South American Republics formally announced a departure, in favor of the United States, from the obligations of impartiality. Some of them, like Guatemala, El Salvador and Costa Rica, offered their territorial waters and ports for the use of the naval forces of the United States. Others, like Brazil and Uruguay, expressly modified their neutrality regulations in that direction. Uruguay issued a decree announcing that she would not treat as a belligerent any American nation engaged, in defense of its rights, in a war with states in other continents and Germany did not consider this decree as resulting in a state of war.

Thus, American states tendered to the United States, when in the throes of war, moral and economic support based on a conviction of the justice of our cause and the identification of their ultimate well being with our success—a generous manifestation of good will for which my countrymen and my Government will never cease to be grateful and to reciprocate. In fact the Joint Resolution of Congress enacting our Neutrality Act of 1939 provided: "This joint resolution (except Section 12) shall not apply to any American republic engaged in war against a non-American state or states . . ."

### Effect of World War

The experience of the World War was too much for any doctrine that all war was to be accepted as just.

This doctrine was revised by the Covenant of the League of Nations. That instrument substantially limited the right of war and imposed upon its members certain duties designed to enforce that limitation.

The Covenant of the League of Nations did not abolish neutrality. It did not impose upon the members of the League the duty to go to war with the Covenant-breaking state. But it did lay upon them the obligation to adopt against the responsible state what was theretofore regarded as unneutral conduct contrary to international law. To that extent it revived nonparticipation combined with active discrimination against the aggressor and active assistance to the victim of aggression. The attitude of Great Britain during the Italo-Abyssinian war in 1935 and 1936 illustrated clearly the position created by the Covenant. Great Britain did not declare war on Italy. At the same time she insisted that Italy was not entitled as a matter of law to expect from Great Britain the fulfilment of any obligations either of the Hague Conventions or of the

1. 3 *De Jure Belli et Pacis*, 293 (Whewell ed., 1853).

2. In the seventeenth and eighteenth centuries it was not uncommon to grant the right of passage to one belligerent only. In particular, such one-sided aid was freely extended in pursuance of pre-existing treaties promising help in case of war. It comprised not only the right of passage, but also deliveries of supplies and contingents of troops. This admissibility of qualified neutrality, in conformity with previous treaty obligations, was approved by writers of authority, including leading publicists like Vattel and Bynkershoek, who otherwise stressed the duties of impartial conduct. Wheaton, the leading American writer, asserted, as late as 1836, that a neutral may be bound, as the result of a treaty concluded before the war, to furnish one of the belligerents with money, ships, troops, and munitions of war. Kent, another authoritative publicist, expressed a similar view. Distinguished European writers, like Bluntschli, shared the same opinion. Even as late as the nineteenth century, governments occasionally acted on the view that qualified neutrality was admissible. In 1848, in the course of the war between Denmark and Germany, Great Britain, acting in execution of her treaty with Denmark, prohibited the export of munitions to Germany. During the South African War, Portugal complied with the obligations of her treaty with Great Britain and permitted the landing of British troops on Portuguese territory.

customary rules of neutrality. Great Britain thus applied the concepts of international law which logically resulted from substantial curtailment of the right of war. Great Britain and other members of the League of Nations adopted an identical attitude in the course of the hostilities between Finland and Soviet Russia. The British Government supplied Finland with arms and ammunition; it authorized the setting up in Great Britain of recruiting bureaus for the Finnish army; and it adopted other measures clearly prohibited by the Hague Conventions.

There would be obvious inconsistency in the United States invoking the benefits of a Covenant to which it refused adherence, but I cite the Covenant because it both evidences and dates the changed position of both war and neutrality in the world's thought. And it was followed by another commitment to which we were a party.

The Kellogg-Briand Pact of 1928, in which Germany, Italy, and Japan covenanted with us, as well as with other nations, to renounce war as an instrument of policy, made definite the outlawry of war and of necessity altered the dependent concept of neutral obligations.

The Argentine Anti-War Treaty, signed at Rio de Janeiro in 1933, is one of the most important American contributions to the growth of the law in the last decade. It is in a real sense a precursor of the system of consultation which was started at Buenos Aires in 1936. The implications of consultation are well recognized today.

### Elihu Root and a New International Order

In 1918, in a letter to Colonel House who was then preparing a first draft of a plan of a League of Nations, Elihu Root expounded the fundamental bases for a new international order. He wrote in part as follows:

> "The first requisite for any durable concert of peaceable nations to prevent war is a fundamental change in the principle to be applied to international breaches of the peace.
>
> "The view now assumed and generally applied is that the use of force by one nation towards another is a matter in which only the two nations concerned are primarily interested, and if any other nation claims a right to be heard on the subject it must show some specific interest of its own in the controversy. . . . The requisite change is an abandonment of this view, and a universal formal and irrevocable acceptance and declaration of the view that an international breach of the peace is a matter which concerns every member of the Community of Nations—a matter in which every nation has a direct interest, and to which every nation has a right to object."[3]

The principle stated by Mr. Root has been accepted by practically all states in the Treaty for the Renunciation of War, in the Argentine Anti-War Treaty, and in the replies to Secretary Hull's famous statement of July 16, 1937. That principle lies at the very foundation of our present policy.

### Present Aggressive Wars

Present aggressive wars are civil wars against the international community. Accordingly, as responsible members of that Community, we can treat victims of aggression in the same way we treat legitimate governments when there is civil strife and a state of insurgency—that is to say, we are permitted to give to defending governments all the aid we choose.

In the light of the flagrancy of current aggressions, which are apparent on their face, and which all right thinking people recognize for what they are, the United States and other states are entitled to assert a right of discriminatory action by reason of the fact that, since 1928 so far as it is concerned, the place of war and with it the place of neutrality in the international legal system have no longer been the same as they were prior to that date.

### Treaty Obligations Disregarded

That right to resort to war as an instrument of national policy was renounced by Germany, Italy and Japan in common with practically all the nations of the world, in a solemn treaty which the United States helped to call into being, to which it has become a party, which it has been its proclaimed intention to make the cornerstone of its foreign policy, and whose provisions it has invoked on repeated occasions as expressing a fully binding international obligation. The present hostilities are the result of and have been accompanied by repeated violations of that Treaty by Germany, Italy and Japan. It may be noted in this connection that Italy was the first state to adhere to the Argentine Anti-War Treaty, after the original signatories.

The Treaty for the Renunciation of War and the Argentine Anti-War Treaty deprived their signatories of the right of war as an instrument of national policy or aggression and rendered unlawful wars undertaken in violation of their provisions. In consequence, these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories *the duty* of discriminating against an aggressor, but it conferred upon them *the right* to act in that manner. This right they are indisputably entitled to exercise as guardians both of their own interests and of the wider international community. It follows that the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states, unless treaty obligations require different handling of affairs. It derives no rights from its illegality.

### Views of Experts

It is not to be overlooked in this connection that two groups of highly reputable international lawyers have agreed in general with this position. I refer to the International Law Association (especially to the Budapest Articles of Interpretation) and to the Research in International Law conducted under the auspices of the faculty of Harvard Law School, which, after considering this matter, came to substantially the same view, with the qualification that they might be more exacting with reference to the determination of the aggressor by a method to which the alleged lawbreaking states had theretofore agreed.[4] Of course neither of these

3. Root's letter to House appears in *The Intimate Papers of Colonel House*, arranged by Charles Seymour, IV, 43. See also Jessup, *Elihu Root*, II, 376.

*Secretary Stimson's Views*

4. Almost contemporaneously with going into force of the Kellogg-Briand Pact, and at a time when it was not self-serving, United States Secretary of State Stimson, in 1932, announced his view of the change which that Treaty wrought in our legal philosophy: "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of

bodies spoke in relation, specifically, to conditions existing today.

Most international lawyers will agree that where there is a specific legal obligation not to resort to armed force, where there has been a resort thereto, and where it has been appropriately determined that one party is the aggressor by a method which the aggressor has agreed to accept, the traditional rules of neutrality need not be applied. The difficulty with this proposition lies in the lack of means for determination of the fact of aggression.

### Aggression Compels Prompt Counter Methods

There are compelling reasons why we must not await a judicial or other formal determination of aggression today. In the evolution of law we advance more rapidly with our concepts of substantive rights than with our machinery for their determination. Rough justice is done by communities long before they are able to set up formal governments. And where there is a legal obligation not to resort to armed force it can be effectuated as legal obligations have always been effectuated on the frontiers of civilization before courts and machinery of enforcement became established. In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice, we may not stymie international law and allow these great treaties to become dead letters. Intelligent public opinion of the world which is not afraid to be vocal and the action of the American States has made a determination that the Axis powers are the aggressors in the wars today which is an appropriate basis in the present state of international organization for our policy.

### Axis Powers Have Themselves Violated Our Rights

By resorting to war in violation of the provisions of the Kellogg-Briand Pact, or the Argentine Anti-War Treaty, the Governments of Germany, Italy and Japan, violated a right and affected the interests of the United States. It was not a mere formal or theoretical right that was thus affected. The very basis of these treaties

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nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as law-breakers.

"By that very act we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treatises." [*The Pact of Paris. Three Years of Development.* Address by the Honorable Henry L. Stimson, Secretary of State, before the Council on Foreign Relations, August 8, 1932, United States Government Printing Office, Washington, 1932; Supplement to the October 1932 number of "Foreign Affairs".]

#### *International Law Association's Views*

These codes and treatises have been and are being reexamined as Secretary Stimson suggested they must be, and the legal consequences of the Kellogg-Briand Pact in the matter of neutrality were formulated in the so-called Budapest Articles of Interpretation adopted in 1934 by the International Law Association. They read as follows:

"WHEREAS the Pact is a multilateral law-making treaty whereby each of the High Contracting Parties makes binding agreements with each other and all of the other High Contracting Parties, and

"WHEREAS by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes or conflicts:

"(1) A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder.

"(2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

"(3) A signatory State which aids a violating State thereby itself violates the Pact.

"(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:

(a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;

(b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;

(c) Supply the State attacked with financial or material assistance, including munitions of war;

(d) Assist with armed forces the State attacked.

"(5) The signatory States are not entitled to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.

"(6) A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals.

"(7) The Pact does not affect such humanitarian obligations as are contained in general treaties, such as The Hague Conventions of 1899 and 1907, the Geneva Conventions of 1864, 1906 and 1929, and the International Convention relating to the Treatment of Prisoners of War, 1929." *Report of the Thirty-eighth Conference of the International Law Association*, Budapest (1934) pp. 66-68; also, 33 A.J.I.L. (Supp.) 825-826, note 1.

These Budapest Articles did not secure unanimous approval on the part of international lawyers, but they gained support from a majority of them. Even those jurists who felt unable to subscribe fully to the Budapest Articles of Interpretation were emphatic that the Kellogg-Briand Pact effected a decisive change in the position of the law of neutrality. Thus, the late Åke Hammarskjöld, a Judge of the Permanent Court of International Justice from 1936 until his death in 1937, in discussing, in the course of the Budapest Conference, the implications of the Kellogg-Briand Pact in relation to neutrality, said: "You will have noticed that, except when the texts compelled me to use the word 'neutrality,' I have been careful to use another word: the status of non-belligerency . . . I have chosen the other expression merely because I wanted to underline that the status of non-belligerency under the Kellogg Pact is not necessarily identical with the status of neutrality in pre-war international law." [Report 38th Conf., *loc. cit.* at 31.]

The Budapest Articles of Interpretation were not disapproved by the United States. On the contrary, Secretary of State Stimson, speaking before the American Society of International Law on April 26, 1935, said: "Our own government as a signatory of the Kellogg Pact is a party to a treaty which may give us rights and impose on us obligations in respect to the same contest which is being waged by these other nations. The nation which they consider an aggressor and whose actions they are seeking to limit and terminate, may be by virtue of those same actions a violator of obligations to us under the Kellogg Pact. Manifestly this in itself involves to some extent a modification in the assertion of the traditional rights of neutrality. . . .

"Even in the face of this situation some of our American lawyers have insisted that there could be no change in the duty of neutrality imposed by international law. I shall not argue this. To such gentlemen I only commend a study of the recent proceedings last summer of the International Law Association at Budapest. The able group of lawyers from many countries there assembled considered this question and decided that in such a situation the rules of neutrality would no longer apply among the signatories of the Kellogg Pact, and that we, for example, in such a case as I have just supposed, would be under no legal obligation to follow them." [Proceedings of the American Society of International Law (1935) pp. 121, 127.]

was the assumption that, in this age of interdependence, all its signatories had a direct interest in the maintenance of peace and that war had ceased to be a matter of exclusive interest for the belligerents directly affected. If that is so—and it is so—then international law provides an ample and practically unlimited basis for discriminatory action against states responsible for the violation of the treaty or treaties.

The Treaty for the Renunciation of War and the Argentine Anti-War Treaty, by altering fundamentally the place of war in international law, have effected a parallel change in the law and status of neutrality and we claim the wider rights which that change imparts. But independently of that view, there is another sound basis for our action today.

### Doctrine of Self-Defense

The legitimate application of the doctrine of self-defense and the implications of anti-war treaties go hand in hand. It is in these fields where perhaps the most important developments of international law will take place in the immediate future, and these are the developments which the international community has sorely needed—developments in international sanctions.

We all know that since 1928 the principle of self-defense has been used as an excuse for internationally illegal action, but we also know that there is a legitimate principle of self-defense in international law, which is one of its most fundamental principles. The standard of action under this principle, as under other principles of law, is that it is to be applied in relation to what the reasonable man (or state) would do under the same or similar threatening circumstances. There can be no doubt that the political, territorial, economic, and cultural integrity of the Western Hemisphere is menaced by totalitarian activities now going on outside this hemisphere. In this situation the principle of self-defense may most properly be invoked, and we in the Americas are invoking it in relation to the facts as we know them and as we, in our best judgment, can foresee them in the future. We are today putting content into the principle of self-defense by giving it concrete application which will create important precedents. By this action we are again showing the fundamental soundness of this principle of international law, and are developing its implications at the very moment when we are being charged, in certain quarters, with ignoring or violating the less fundamental rules of neutrality which are, both in fact and in law, irrelevant to the existing situations.

### Implementation of Self-Defense

The present implementation of the principle of self-defense did not start with the Lend-Lease Bill in the United States. It began at the Panama Consultation in 1939 and was developed in relation to the law of neutrality by the Inter-American Neutrality Committee at Rio de Janeiro, as endorsed by the Consultation of Foreign Ministers here at Havana in 1940. That historic meeting accepted the recommendations of the Neutrality Committee and adopted the Act of Havana for the provisional administration of European possessions and colonies in the Americas. It went further and proclaimed the right and the duty of any signatory to take defense measures if the safety of the continent were threatened.

These events have ushered into international law a basis upon which the United States, may legally give aid to the Allies in the present situation. No longer can it be argued that the civilized world must behave with rigid impartiality toward both an aggressor in violation of the Treaty and the victims of unprovoked attack. We need not now be indifferent as between the worse and the better cause, nor deal with the just and the unjust alike.

To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive. A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace.

### International Reconstruction

The principle that war as an instrument of national policy is outlawed must be the starting point in any plan of international reconstruction. And one of the promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle of our society.

The only sanction that seems available in our time is the freedom of the right-thinking states of the world, particularly the states of the Western Hemisphere, to give a material implementation to their moral and nationally official judgments as to the justice of a war. The American States have done this officially with respect to the invasion of Belgium, Holland and Luxemburg.[5] A public opinion which can express itself only in sermons is not likely to restrain the aggressive propensities of any powerful state. If, however, that opinion may command measures short of war that are likely to prevent the success of aggression, it is certain to have some deference even from the ruthless. Short of war measures which enlightened opinion may invoke include all forms of moral censure and diplomatic disapproval, discriminatory embargoes or boycotts, as well as financial credits and furnishing of supplies and material, weapons and ships. These speak a language understandable to those deaf to the precepts alike of Christian civilization and of legal obligation and scholarship.

### President Wilson's View

After an experience that ranged from complete impartiality, through "armed neutrality" and then to war itself, President Wilson in 1919, addressing a group of international lawyers, said:

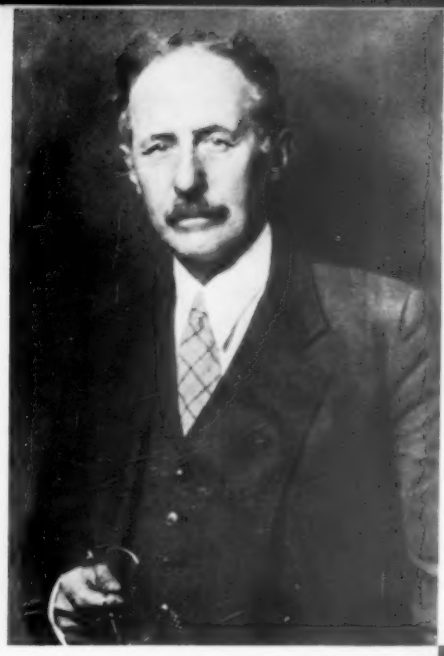
> "If we can now give to international law the kind of vitality which it can have only if it is a real expression of our moral judgment, we shall have completed in some sense the work which this war was intended to emphasize."

The quarter century that followed has in my judgment given to international law that vitality—the League Covenant began the modification of the old concept that all wars were just and legal. The Pact of Paris and the Argentine Anti-War Treaty completed the outlawry of war. The signatory may now in its policy express its discriminating judgment and its moral convictions.

It is upon these considerations that I have advised my Government in the hope that its course may strengthen the sanction against aggression and contribute to the realization of our aspiration for an international order under law.

5. On the initiation of Uruguay, the American States released a joint declaration protesting against the military attacks directed against these states. They declared, in part, that: "The American Republics in accord with the principles of international law and in application of the resolutions adopted in their inter-American conferences, consider unjustifiable the ruthless violation by Germany of the neutrality and sovereignty of Belgium, Holland and Luxemburg." [Department of State Bulletin, May 25, 1940, p. 568.]

# NOMINATED FOR BOARD OF GOVERNORS



Frank W. Grinnell

Willis Smith

Top: Morris B. Mitchell
Bottom: Floyd E. Thompson

AT THE mid-winter meeting in Chicago, Frank W. Grinnell, of the Boston Bar, was nominated for member of the Board of Governors from the First Circuit to fill the vacancy left by the death of George R. Grant of Boston. The election will take place at the Indianapolis meeting. Mr. Grinnell is a member of the firm of Hale & Dorr, but has retired from active practice. He is a graduate of Harvard Law School and was admitted to the Massachusetts Bar in 1895. He is Editor of the Massachusetts Law Quarterly and Secretary of the Judicial Council of Massachusetts. He has long been active in the American Bar Association.

Willis Smith, of the Raleigh, N. C. Bar, was nominated for member of the Board of Governors from the Fourth Circuit at the mid-winter meeting in Chicago. The election takes place at the fall meeting at Indianapolis. He is a member of the firm of Smith, Leach & Anderson. He was admitted to the Bar in 1912. He is a graduate, both College and Law, of Trinity College (now Duke University). He served as Speaker of the House of Representatives of North Carolina, 1931. He has long been active in Bar Association work; was a member of the ABA General Council, 1935-36; and is now State Delegate for North Carolina to the ABA House of Delegates.

Morris B. Mitchell, of the Minneapolis Bar, was nominated for member of the Board of Governors from the Seventh Circuit at the mid-winter meeting in Chicago. The election will occur at the annual meeting at Indianapolis. Mr. Mitchell is a member of the firm of Cronin, Mitchell and Shadduck. He graduated from Harvard Law School and was admitted to the Bar in 1916. He is active in Bar Association matters and is Chairman of the ABA Committee on Credentials and Admissions and a member of the Committee on Ways and Means.

Floyd E. Thompson, of the Chicago Bar, was nominated for member of the Board of Governors from the Eighth Circuit at the mid-winter meeting in Chicago. The election takes place at the annual meeting at Indianapolis. Judge Thompson is a member of the firm of Poppenhusen, Johnston, Thompson & Raymond. He sat on the Supreme Court of Illinois from 1919 to 1928, and was Democratic candidate for Governor in that state in the latter year. He has long been active in Bar Association work, and was President of the Illinois Bar Association, 1933-34. He has been Illinois State Delegate to the ABA House of Delegates, 1939 to 1942.

# JUSTICE—MORE EQUAL AND MORE EXACT*

By JOHN C. KNOX

Senior United States District Judge for the Southern District of N. Y.

THE CALL for greater endeavor in this time of grave emergency, to protect ourselves by perfecting and increasing the efficiency of our domestic institutions is not without precedent. Often, in times of crisis, the American Bar has intensified its effort and its accomplishment in its constant campaign to improve the Administration of Justice.

### Jefferson's Program

Thomas Jefferson, in his first inaugural address of March 4, 1801, outlined a program for the preservation of democracy that is as appropriate in our present danger as it was when he, as our greatest lawyer-statesman first stated it:

> Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all Nations, entangling alliances with none; the support of the state governments in all their rights, as the most competent administrators for our domestic concerns and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigour, as the sheet anchor of our peace at home and safety abroad; freedom of religion; freedom of the press; freedom of person under the protection of habeas corpus; and trial by juries impartially selected,—these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.

Jefferson speaks first of "equal and exact justice to all men." In these words he has epitomized the high aim of our judicial establishment. To the extent that courts and lawyers lose sight of that goal, they lose the respect of the public they serve, and correspondingly, they weaken the democratic system of which they are a part. It is, therefore, the special responsibility of all lawyers at all times to devote their energy and their influence to the improvement of the machinery of the institutions through which we strive to bring to all men, justice that is as equal and exact as can be humanly achieved.

### Redoubled Efforts in Times of Emergency

Our efforts are redoubled in times such as these, when the very foundations of democracy appear to be unstable, and when violent forces are at work throughout the world to undermine our belief in the genius of governmental structure. The building of fortresses, the manufacture of guns, and other implements of war, the training of an unbeatable army and navy, and the production of all those material things that are needed to save not only ourselves but also the men, women, and children across the sea who believe as we do, are, all of them, only one side of our program. We must also look well to our domestic institutions, in order that they may become so strong and so efficient that no others can compete with them for the allegiance of our people. It is for the lawyers and judges to see that this is done in the courts of justice.

The task is not an easy one. Lawyers, like other men of special learning, are prone to retain and defend the sometimes esoteric procedures and techniques with which they are familiar, even after the reason for the existence of those procedures and techniques has disappeared. The Study of the Law of Evidence undertaken by The Commonwealth Fund in the 1920's disclosed an eloquent example of this attitude when its research staff questioned lawyers as to the desirability of a relaxation of some of the strict rules dealing with disqualifications as witnesses of interested persons in actions by or against representatives of a deceased or incompetent. About 60 per cent of those who expressed opinion on the Massachusetts statute believed its enactment in New York would open the door to fraud and perjury, and would not assist in the ascertainment of truth. More than 60 per cent of those expressing opinion on the Connecticut statute considered that its adoption in New York would be unwise for that reason. But when experienced lawyers in Massachusetts and Connecticut were questioned as to the desirability of retaining their more liberal statutes, the answers were overwhelmingly in favor of their retention.[1]

### Hostility Toward Change

This traditional hostility of the bar to procedural change, despite its persistency, has recently undergone dramatic reversal in the Federal judicial system. In 1938, under the leadership of the Supreme Court, the Federal Rules of Civil Procedure, which are now hailed as a land mark in the history of American jurisprudence, and are generally accepted as such by the bench and bar, were promulgated. The administration of the Federal courts has likewise experienced a momentous reform with the establishment by Act of Congress in 1939 of an administrative office under judicial supervision devoting its entire energies to the service of the courts. At the present time the procedure in criminal cases in the Federal courts is also being overhauled in the interests of efficiency. The impetus which these accomplishments in the Federal field have given to the whole movement for improvement in the administration of justice, affords an unusual opportunity for similar belated advances in the judicial procedure of the states. Leaders of the bench and bar, inspired by the improvements in the Federal system and by the extraordinary present need for perfecting and defending all judicial institutions, are working as never before to bring about these long needed reforms. Lawyers throughout the

*This article is the sixth published in consecutive issues of the Journal in advocacy of the program of the Special Committee on Improving the Administration of Justice.

[1]The Law of Evidence—Yale University Press, 1927, pp. 65-68.

country must and will rally to the support of the comprehensive program thus put before them.

### Selection of Jurors

One of the fields of improvement which this program includes and which merits particular attention is the method of selection of jurors. Jefferson pointed out that "trial by juries impartially selected," was one of the beacons by which he and his associates charted the development of our Democracy. The right is guaranteed by the Bill of Rights of the Federal Constitution and by the constitutions of the various states. It is one of the foundation stones upon which our system of government was built. Today, jury service is the chief remaining governmental function in which lay citizens directly and actively participate. It provides the best means within our experience of determining truth and of keeping the administration of the law in tune with the standards of the community. Yet in recent years, we have had to face the fact that the system of jury trial is being criticized. The fundamental reason for this is plainly before us. Men of ability do not often enough occupy the jury boxes in our court rooms. The success of the jury system requires that good Americans, representative of the community, should stand as a check between the citizens and their government.

Power grows by that upon which it feeds. All representatives of governmental power must be restrained, and sufficient restraint often does not come from within. To guard against arbitrary abuse of power, we have hedged our officials with "checks and balances," and nowhere more than in this is the genius of our founding fathers made clear. In the courts, where wilful power is sometimes present, the checks and balances very frequently lie with the jury. For this reason, if for no other, jurors are tremendously important. Yet juries do more than simply restrain the judge. They must be able to reach their own conclusions, and their verdicts can never rise above the sum total of the intelligence of the persons who compose them.

### Unwillingness to Serve

More often than one would suppose, men of character who might be expected, because of their intelligence and education, to be most anxious and capable to perform this important public service, are found to be the least willing to undertake it. Educated and experienced men, leaders of business, men of ability and understanding, are needed on our juries. Everyone realizes that their time is valuable, and that the three or four dollars a day which they receive as jurors often does not compensate them for their time. Yet, the welfare of democracy and the proper administration of justice by which they benefit are their creditors, and their service as jurors is a form of public duty which they are under obligation to perform. If they, themselves, are summoned into court they will expect men of intelligence and integrity to be on the juries that will hear their cases.

A number of years ago we were told that jurors should be selected from among the unemployed. It was argued, with some justice, that the jury fee would be of help to those unfortunate but deserving people who, due to the depression, were otherwise without income. My associates on the bench of the United States District Court for southern New York doubted the wisdom of this plan, but we agreed to try it. Its fallacy was soon demonstrated by experience. Juries made up largely of the unemployed did not dispense even-handed justice. They showed a rather marked tendency to decide civil cases against employers who happened to be parties to the suits before them. Similar results were observed in criminal cases, and it soon became necessary to remove a large number of the unemployed from the jury lists.

### Selecting Qualified Jurors

In the Federal District Court in New York at the present time most of the jurors chosen are, I believe, well equipped to undertake their responsibilities. This is due in large part to a persistent effort during the past few years to choose the names of potential jurors from well considered and various sources, to inquire personally of those thus chosen and before they are called for duty, as to their qualifications and their convenience and preferences concerning time of service, to place in the jury wheel only the names of persons who are capable of serving if they are called, to treat those called with consideration and understanding, and to provide comfortable quarters and conveniences for the jurors during their terms of service. It has also been considered of importance that the high responsibility of the public duty for which they may be chosen should be held constantly before all prospective jurors. In all this work the court has been fortunate to have the able and conscientious assistance of its Jury Commissioner and of its Clerk and his deputies. The key to the problem lies in the hands of these men, and without their sympathetic cooperation no system will be satisfactory.

### Success in Other Areas

Information has come to me that great success in the administration of the jury system has been achieved in Cleveland, Detroit, and parts of California. These experiences show that with effort and understanding, our system of jury trial can become the efficient instrument for the ascertainment of truth that it is intended to be. Constant striving to perfect this mechanism of the court is effort well expended.

Democracy now faces its greatest trial. To meet it we are demanding sacrifices from all our people. Surely we must not allow the very concept we are defending to become meaningless in action. The machinery of justice as we know it must be made to be worth our sacrifice. Only thus can we give the lie to those totalitarians who say that in the democracies, courts are so slow and inefficient that they deny justice more often than they assure it.

*The Exchange, New York, 1790*

# THE SUPREME COURT—
# ITS HOMES PAST AND PRESENT[1]

THE SUPREME COURT since 1937 has, at long last, become permanently located in a fitting home of its own, the new Supreme Court Building, which is one of the finest additions to "beautiful Washington." During the first century and a half of its existence the Court moved from one quarters to another eleven times. Some of these moves were caused by the shifting of the Capitol itself, from New York, to Philadelphia, and thence to Washington; some were due to fire or alterations in its quarters; some were due to the gradual completion of the Capitol Building. As a part of the account of the celebration of the One Hundred and Fiftieth Anniversary of the First Session of the Supreme Court, the Journal printed some material on this subject last year (see vol. 26, pages 201, 205, 224, 226, 368, 469, and 535),—in particular, a valuable letter from Robert P. Reeder, the author of an article based on original studies in the Washington archives (76 Proc. Amer. Philos. Soc. (1936), pages 543-96). The JOURNAL presents herewith, "for the record," pictures of the various buildings (or rooms) in which the Court has sat; together with a short narrative account of the buildings themselves.

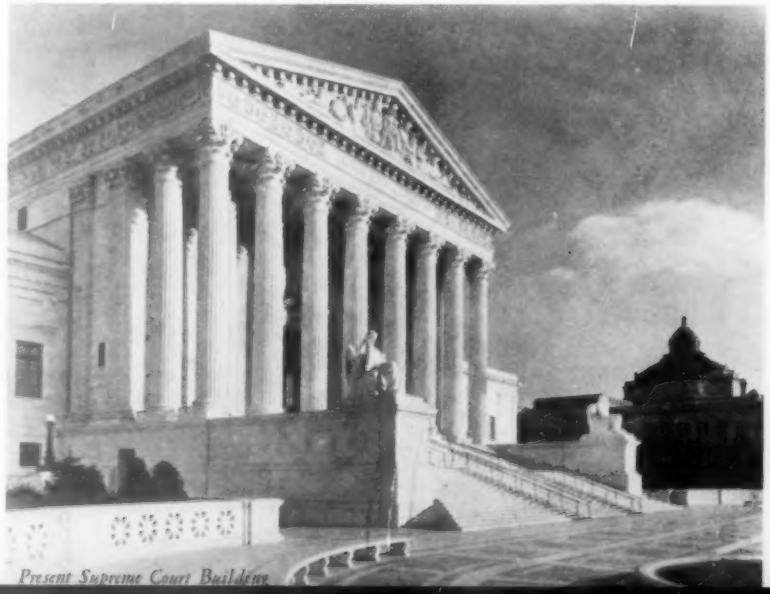
1. This article is due in large measure, both for its inspiration and its facts, to Hon. Thomas E. Waggaman, Marshal of the Supreme Court of the United States.

**Exchange Building, New York—First Home**

The first session of the Court was held, pursuant to the Judiciary Act of 1789, at the Capitol in New York City, the Court, under that Act, consisting of a Chief Justice and five Associate Justices, or six members in all. The Court convened, Monday, February 1, 1790, but on that day, no quorum was present and the Court adjourned. On the following day a quorum appeared, consisting of Chief Justice John Jay and Justices William Cushing, James Wilson and John Blair. The minutes for that day recite among other things:

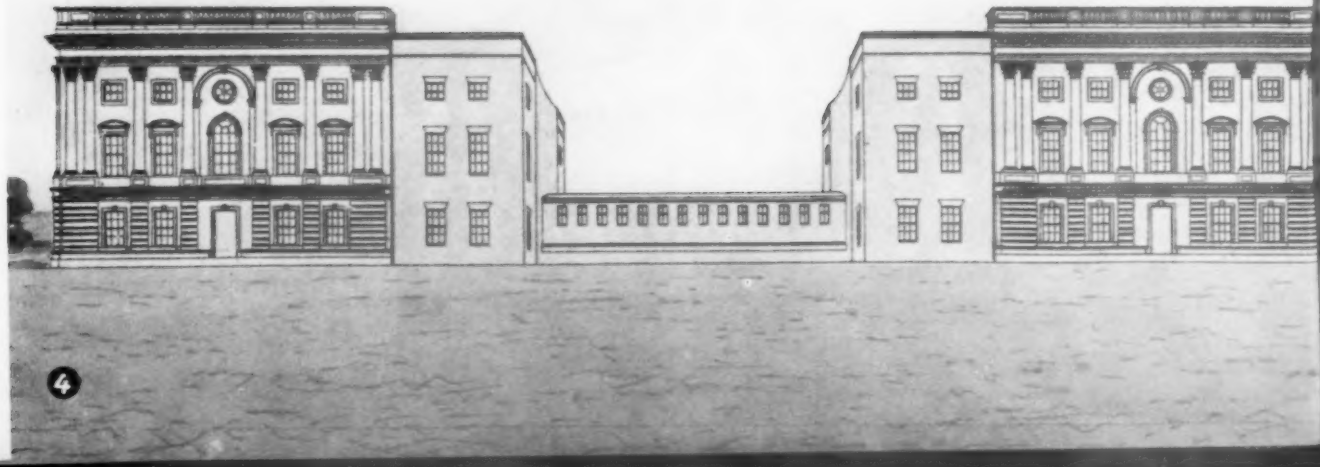
"Proclamation is made and the Court is opened."

The February Term 1790 of the Court lasted from February 1 to February 10. The August Term, 1790 lasted two days, August 2, and 3. Both Terms were held in "The Exchange," a building "located in the middle of Broad Street, at the intersection of Water Street, north of and extending half-way across the



*Present Supreme Court Building*

1



4

Philadelphia City Hall (since restored) and
pendence Hall about 1790. See text.

Capitol at Washington in 1800. See text.

Room in the basement of the present Capitol
ding occupied by Marshall of Court about
0.

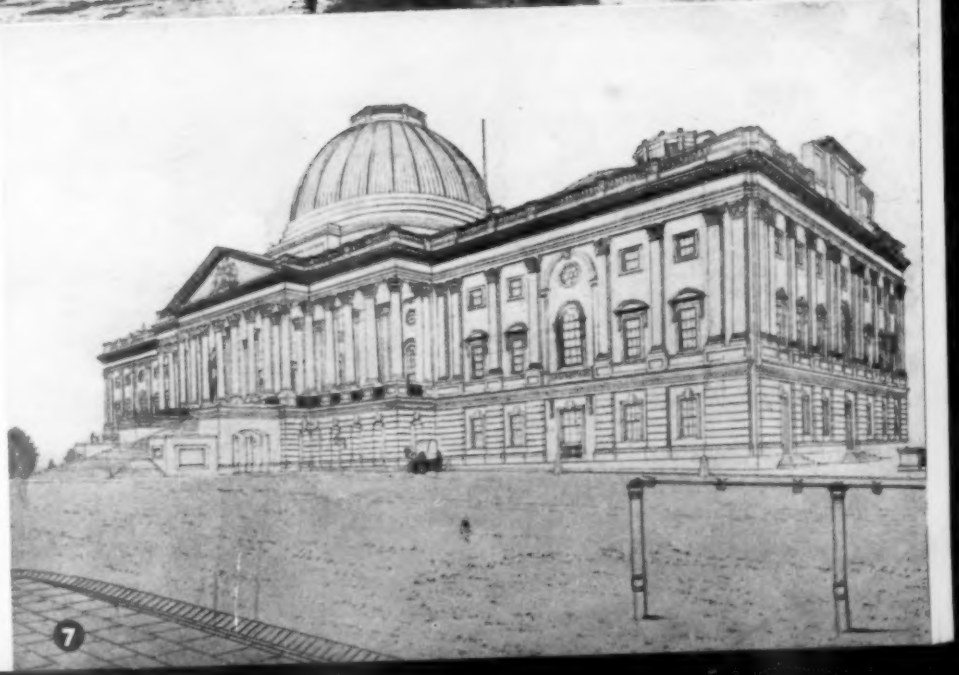
Capitol before it was burned by the British in
4.

Caldwell House, once thought to have been
pied by the Court for a short period about
9. See text.

The Capitol about 1860 showing the unfin-
d Bulfinch dome.

Completed Capitol about 1865.

Room in the Capitol building occupied by the
rt from about 1819 to 1860. See text.



latter thoroughfare."[2] The picture of "The Exchange" here presented is copied from the steel engraving which decorated the official program, issued by the Court, when the present new building was dedicated, in 1937. "The Exchange" which was built of brick, was finished in 1754. Its first floor served as a market place. The second floor contained a room "sixty feet long with a vaulted ceiling" in which the sessions of the Court were held.

It appears that sessions of the State Legislature and later sessions of the Federal Circuit and District Courts were held in the building. In March, 1799 the Common Council ordered the "Exchange" building removed. Thus the first chapter of our story was ended.

### Independence Hall, Philadelphia—Second Home

The Capitol of the United States was removed from New York City to Philadelphia pursuant to the Act of July 16, 1790 (1 Stat. 130) and the Supreme Court of course went along. The February Term, 1791 of the Court convened on February 7, and adjourned on February 8. It was held at Independence Hall, then known as "The State House." This building which thereby became the second Home of the Court, is the well-known national shrine located on the south side of Chestnut Street between 5th and 6th Streets, in the City of Brotherly Love. The picture here presented is from an old print, and shows the appearance of Independence Hall around the Colonial era. The building was begun in 1732 and by 1760 "twelve thousand and sixty pounds had been spent on the land, tower and wings" of the structure. In 1816 the building and the square were sold to the City for $70,000, which represented the cost of the buildings rather than the value of the premises, at that time.

### Old City Hall, Philadelphia—Third Home

It seems to have been understood, when the Capitol was moved to Philadelphia, that the Supreme Court would sit in the City Hall, where the "Mayor's Court" would sit. That building however was just being erected, and was not completed until the summer of 1791. This fact had forced the Court to hold its first sessions in Philadelphia, in Independence Hall, as above described. The Term of the Court which began August 1, 1791 was accordingly held in the City Hall. The Court sat in this building until 1800, when the Capitol was moved to Washington.

The "Old City Hall" in Philadelphia, which is shown on the old print, published herewith, stood (and still stands) alongside Independence Hall. Its cost was partially borne by a lottery, which was authorized by the Act of March 27, 1789, passed by the Pennsylvania Assembly. Advertisements for the lottery appeared in the press during 1790, one of them, in the "Federal Gazette" of September 22, reciting that—

> "Temporary alterations of the County Hall, while it subjects the judicial department to some inconvenience, renders it necessary that the City Hall should be completed with the utmost expedition."

Apparently the Supreme Court and the "Mayor's Court" shared the same Court room on the first floor, since they sat at different times, the latter being in a sense the dominant tenant. At least it appears that in 1796, when the "Mayor's Court" was due to hold an advertised session in the Court room, the Supreme Court which was in session on March 14 of that year, obligingly vacated the court room and sat for that day in the chambers of the Common Council, or the second floor of the building.

In the City Hall, gowns seem to have been worn by the Supreme Court for the first time. On February 11, 1792 the Federal Gazette noted that on the previous day, the "Judges appeared on the bench in their robes of office." It is also of interest that jury trials were held in this room by the Supreme Court—the jury cases being *Oswald v. New York,* 2 Dallas 401; *Cutting v. S. Carolina,* 2 Dallas 415; and *Georgia v. Brailsford,* 3 Dallas 1.[3]

The Court also seems, on some occasions, to have kept long hours for its sessions, because the minutes for this period recite:

> "Adjourned till seven o'clock this evening. Saturday evening, 22nd August, 1795 . . . The Court proceeded to hear argument of counsel."

The records of the Court show that on August 14, 1800, the Court adjourned the August Term; thereby writing "Finis" to its history in Philadelphia.

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2. "First Homes of the Supreme Court of the United States," by Robert P. Reeder. Credit is due to that book and author for much of the infomation in this article.

3. The following interesting information about these three jury trials has been furnished from the original files in the Clerk's office in Washington through the personal attention and kindness of Mr. Waggaman, Marshal of the Court.

*Georgia v. Brailsford*

"Tuesday, 4th February, 1794

• • • The Jury impannelled and summoned in the above suit being called do now appear to wit [here are listed the names of the 12 jurors] And are Severally Sworn or Affirmed to try the issue. • • •

"Friday, 7th February, 1794

• • • The trial of the present Cause was this day concluded the Jury retired for a few minutes and on their return to the Bar by their Foreman, Reynold Keen, say they find a verdict for the Defendants."

*Oswald v. New York*

"Thursday, 5th February, 1795

• • • The Jury are called [the Jurors names being given] were sworn or affirmed as Jurors. John Dunlap and David Hall were sworn as Witnesses. It is agreed by the Parties, that the Jury may give their Verdict tomorrow.

"Friday, 6th February, 1795

The Jury find for the plaintiff, five thousand three hundred and fifteen dollars damages and six cents costs."

*Cutting v. South Carolina*

"Tuesday Morning 8th August, 1797

The Court ordered the enquiry of damages in the Case of Cutting v. The State of South Carolina to be now executed at the bar of the Court, and the Jury being called, come to wit [Jurors are named] who being impannelled, sworn and affirmed respectively, well and truly to enquire what damages the said Plaintiff hath sustained • • • find for the Plaintiff five thousand, five hundred and two dollars and eighty four cents Damages by reason of etc."

### Capitol at Washington—Fourth Home

The Act of July 16, 1790, already cited, which removed the Capitol from New York City to Philadelphia, also provided that the Capitol should "be transferred to the District and place aforesaid (Washington, D. C.) on the said first Monday in December, in the year one thousand eight hundred." Accordingly, we find the Journal of the House of Representatives for January 23, 1801 reciting:

> "Leave be given to the Commissioners of the City of Washington to use one of the rooms on the first floor of the Capitol for holding the present session of the Supreme Court of the United States."

The first unit of the Capitol Building in Washington was ready for occupation by the various departments of the government in the fall of 1800. We read that:[4]

> "The north or Senate wing, now occupied by the Supreme Court, and ready for its Congressional tenants November 17, 1800, was finished. The minor partitions, floors, and roof were of wooden construction. It had a basement, first and second story. Portions of the foundations of the central portion of the Rotunda were in place, Thornton having removed the foundations for the square central court which Hallet had had the temerity to put in, and for which he was discharged by Washington. The basement or first story above ground of the House wing, now Statuary Hall, was in process of construction.
>
> "Judging from the relative height of windows, as shown on the exterior, and allowing for thickness of floors, the basement should have been about 18 feet high, the first story from 20 to 22 feet, and the second story 14 or 15 feet. The total size of the completed structure was 126 feet by 121 feet 6 inches."

The Capitol as it appeared in 1800 is shown in an interesting way by one of the accompanying illustrations.

When the Court convened in Washington for the first time, February 2, 1801, it met in a small room on the ground floor of the building. The exact location of the Court room at this time is uncertain. The room shown by illustration No. 3, *ante*, has sometimes been pictured as a room occupied by the Court itself about this time. This is probably an error. This room seems actually to have been occupied instead by the Marshall of the Court.

The growing significance and importance of the Court shortly after the turn of the century is shown in a statement made by the Architect of the Capitol, Mr. Latrobe, in his Report dated Dec. 22, 1805, where he says:

4. Glenn Brown, *History of the United States Capitol* (1900) p. 24.

Supreme Court Room—1860 to 1934

"The crowd of citizens that sometimes attend the Court disturbed the legislative proceedings of the Senate."

The "Floor" of the Senate was on the same ground floor as the room of the Court. One would have thought that the "disturbance" would have been the other way about!

These quarters of the Court were hardly appropriate or adequate. This is proved by a letter from Latrobe to President Monroe, dated September 6, 1809, which says in part:

"The Courts of the U. S. both the Supreme and Circuit Courts . . . occupied a half-finished committee room, meanly furnished and very inconvenient."

Yet these were the quarters in which the Court sat for eight years, and here John Marshall took the oath of office as Chief Justice, February 4, 1801.

In 1808 the work of remodelling the west side of the Capitol building required a temporary dislodgement of the Court from its chambers. Accordingly, the February Term, 1808 was held in the Capitol Library, "formerly occupied by the House of Representatives." This was the room which, down to the removal of the Court to its present building, was used by the Clerk of the Court for his offices. In describing the "library" just prior to its use by the Court, the Capitol architect said in a report to a committee of the Senate:

"The library above stairs, although at present in a very dilapidated condition, and much too large in its present state, for the purpose of the session of the Senate in May next, is the only room in the capitol adapted to the object of your inquiry. It is lofty and airy, and having two ranges of windows, will not be darkened by the blinds that exclude the western sun. I therefore propose to you—to remove the rough seats, benches, and enclosures erected for the accommodation of the supreme court. . . ."

### Long's Tavern—Fifth Home

We now come to a little-known chapter in the Court's perigrinations. In a letter, dated September 6, 1809, the Capitol architect informed President Monroe as follows:

"During the session of the Supreme Court last spring (1809) the Library became so inconvenient and cold that the Supreme Court preferred to sit at Long's Tavern."

We get a pretty picture of the Court sitting in the cozy tavern away from the cold of the Capitol building. This temporary occupancy of Long's Tavern, by the Court, took place during the February Term, 1809, which began on February 6 and lasted to March 15.

Long's Tavern was located on First Street between East Capitol and A Streets, Southeast, where the Library of Congress now stands, and was the northern-most of a row of five houses constructed in 1805 by Daniel Carroll of Duddington and known as "Carroll Row." On the night of March 4, 1809, the Inaugural Ball given for President Madison was held in this Tavern. Regarding this ball Allen Clark says, in his *Life and Letters of Dolly Madison*—

"To the Ball came four hundred from hereabout and all the way from Baltimore. . . .

"The small space was packed with people. Some stood on benches for relief. The window panes were broken to prevent suffocation. . . ."

### The Capitol Again—1810

On February 5, 1810, the Court, for the first time, met in a Court Room designed for it, the present Law Library in the Capitol. It seems to have shared its quarters with the U. S. Circuit Court, and probably the Orphan's Court of the District of Columbia. David C. Mearns, Superintendent of the Reading Rooms of the Library of Congress, several years ago prepared a paper on the Supreme Court to which we are indebted for much interesting material and from which the following inventory of furniture used in the Court Room is taken:

"A bar of the Court, with seats for counsel.
Carved majogany (mahogany) chairs, square stuffed.
A mahogany table or bench with nine drawers.
A clerk's table with pigeon-holes.
Jury boxes, capped with mahogany.
A prisoners' box.
Two boxes for the crier and deputy marshal.
Two boxes for constables.
Ten sets of spectators' seats, not fixt.
Carpets for bench and judges' chamber.
Book-case for the judges' library and for court records."

Several of the items listed in this inventory substantiate the above statement that the room was used by courts other than the Supreme Court. A good picture of this room, taken of course in modern times, is given in this article.

### Bell Tavern—Sixth Home

The British burned the Capitol building in the War of 1812, August 24, 1814. The Capitol was evidently well built, because an unsuccessful attempt was made by the invaders to "break the Court Room's vaulted ceiling by piling the furniture in the center of the room and setting fire to it." However, the Court's chambers were rendered unusable for two years. During this period of restoration a house was rented from Daniel Carroll from December 1, 1814, to July 1, 1816, in which the session of Court commencing on February 6, 1815, was held. This house, later known as the Bell Tavern, was a four-story brick dwelling, located on New Jersey Avenue on the west side, between D and C Streets, Southeast, where the House Office Building Annex now stands. A letter from Jeremiah Mason, Senator from New Hampshire, to Rufus King, Senator from New York, dated December 15, 1816, gives us the following information:

". . . Bailey, a reformed gambler from Virginia, has taken and fitted up for a tavern the house south of the Old Capitol, where the Supreme Court held its session last winter, together with the house adjoining."

The Bell Tavern was torn down in the 60's, and on its site was constructed the granite residence of General Benjamin F. Butler which, in turn, was razed for the present House Office Building Annex. The Building was evidently poorly suited for a Court Room, because it was described by George Tickner, one of the leading

lawyers of the time, as "uncomfortable, and unfit for the purpose for which it was used."[5]

### The Capitol Again—1817

The Court resumed its sitting in the Capitol with the February Term, 1817, but not in its regular court room. We are told that the Court sat in "space assigned for the use of the Court in the north wing of the Capitol," but the location of the space has not been definitely determined. We are told by Mr. Means in the paper already referred to, that before the Court could sit, some method of heating the room had to be devised; and for this purpose a "ten plate stove" costing twenty-eight dollars was installed.

By 1819 the Court was back in its regular Court room, for we read in the "National Intelligencer," for February 1, 1819:

> "We are highly pleased to find that the (Supreme) Court Room in the Capitol is in a state fit for the reception of the Supreme Court."

The court continued to sit in this room down to 1860. It was in this room that the proceedings of the Supreme Court first became what we would now call "front page news." One of the earliest cases to catch the fancy of the newspapers was the famous Dartmouth College Case, 4 Wheaton 518, decided in 1819. From about this time on, such journals as the "National Intelligencer" and "Niles Register" began the custom of regularly reporting the proceedings of the Court, each day of the Terms.

This room, which has long been a part of the Law Library of Congress, is familiar to many of our readers. It was the room where attorneys with cases before the Supreme Court spent their precious hours preparing for their arguments before the Court. It is almost directly below the room which we next consider.

### The Supreme Court Room—1860 to 1937

The next move of the Court was to the room which had long been the Senate Chamber, before the Senate moved to its present location. Here the Court sat for more than three-quarters of a century. Here the great majority of the Supreme Court Bar, now living, were admitted to practice before the Court. Here is the room where much history has been made. We are pleased to present a fine photograph of this Room. It will bring back strong and clear memories to thousands of our readers.

For its December 3, 1860, session Court moved into the chamber in the Capitol which had recently been vacated by the Senate. This chamber is located on the east side of the main corridor between the Rotunda and the present Senate Chamber. The room, with its columns of native Potomac marble, painted grayish walls, mahogany furnishings and background of red drapes and carpets, presents a picture of such simplicity in contrast to the new Court Chamber, that the impression is one of a drawing room rather than a hall of justice.

In this chamber the Court held sessions, with two exceptions, until removal to its present quarters. On November 6, 1898, an explosion of illuminating gas wrecked the environs of the Court Room with the result that the sessions of November 7th to 14th were held in the Senate District of Columbia Committee Room. During reconstruction of the Court Room the October Term of 1901 was held in the Senate Judiciary Committee Room. On December 9, 1901, Court returned for the balance of the Term to its own chamber, where it remained until its final session in the Capitol on June 3, 1935.

### Present Home

On October 7, 1935, the Supreme Court held its first session in its newly completed home across the plaza from the Capitol. This edifice, located between Maryland Avenue, East Capitol, First and Second Streets, Northeast, is on part of the site where for many years stood the old brick Capitol, constructed to house Congress after the burning of Washington by the British. In this old brick Capitol building the sessions of Congress were held from December 8, 1815, until December of 1819. During the Civil War it was used as a prison and shortly thereafter was converted into three residences, one of which was presented by Cyrus W. Field to his brother Mr. Justice Field. In it the Justice lived for many years. These residences in turn were razed, making way for the present beautiful marble courthouse.

### Two Celebrations

On February 1, 1940, the Supreme Court celebrated the 150th anniversary of its first meeting in New York City. The ceremonies of that occasion are recorded at length in the Journal for March 1940. A lot of water has run under the bridge since the organization of the Court in 1790. Perhaps the record of an event as it is described in the *"United States Gazette"* for Monday, February 7, 1790, is worth setting out by way of contrast. We read there:

> "On Monday the Grand Jury for the United States [for the District of New York] gave a very elegant entertainment to the Chief and Associate Justices, the District Judges and the Attorney General, at Fraunce's Tavern in Courtland Street. The liberality displayed on that occasion and the humor which presided gave particular satisfaction to the respectable guests. After dinner the following toasts were drunk."

Here follows thirteen toasts, of which the first and second were to "The President" and "The Vice President," and the third was to "The National Judiciary."

Since its creation by the Constitution in 1789, the Supreme Court of the United States led approximately one hundred and forty-five years of nomadic life, but, at last, it has a permanent home of its own.

U. A. L.

5. The Office of the Marshal of the Supreme Court, which has supplied much material, as well as information about the pictures used in this article, has been unable to obtain a good photograph of this residence. Perhaps some reader of this article may help to locate such a picture, and thus make the album of the Court's Homes more complete.

# LEADING ARTICLES IN CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS
Professor of Law, University of Chicago

## Criminal Law

*The Model Sabotage Prevention Act,* by Sam Bass Warner, in 54 Harvard L. Rev. 602. (February, 1941.)

The 1918 U. S. wartime sabotage law was amended last November so that it could be used under present conditions. But this is not adequate to meet the needs of the nation. Therefore it is argued that the state legislatures should pass the Model Sabotage Prevention Act. This Act was drafted by a committee appointed by the Federal-State Conference on Law Enforcement Problems of National Defense. This legislation is needed because sabotage is a comparatively new instrument of national aggression and saboteurs usually must be punished for committing another crime. Most frequently, this crime is malicious mischief, the prosecution of which, however, is handicapped by several obstacles. There is an answer to this argument and it is written by Lee Pressman, D. William Leider, and Harold I. Cammer. At the outset they appear to make a good point, viz: "Since national defense is most appropriately a matter for federal legislation and one confided to Congress by the Constitution, it would seem that the prevention of interference with defense should most appropriately be left to the Federal Government." But they are not satisfied with the recent federal legislation. Both this and the Model Act, they fear, "will stage a setting for a blitzkrieg on labor and other groups, and effect a sabotage of the constitutional liberties of the American people." The critics also argue that the enforcement of sabotage legislation deserves a centralized control in the Department of Justice at Washington. From this point the critics descend to a stump speech for labor and it is very much like the usual stump speech that the capitalists make when they face pro-labor legislation. They would solve the problem, if there is one, by enacting and initiating labor's program of legislative and executive action. Give organized labor everything it asks and there will be no sabotage in dear old U. S. A.

## Government Business

*The Conduct Of Business Enterprises By The Federal Government,* by David E. Lilienthal and Robert H. Marquis, in 54 Harvard L. Rev. 545. (February, 1941.)

After a brief survey of the extent to which the national government has and is participating in business enterprises, there is extensive consideration of the management of government business, its public control, financing, and taxation. There is a plea for the government corporation as the best method of carrying on these business activities. The corporation, as distinguished from a governmental bureau, is more likely to secure freedom from political control of the business enterprise. It may be financed by a different method than an annual appropriation which offers little incentive to show a balance of unexpended funds at the end of the fiscal year. A different method of accounting than through the General Accounting Office is desirable. This office does not give a business man's audit but decides the legality of expenditures according to the interpretations of the Comptroller General. Business efficiency requires the selection, promotion, and removal of employees on a purely merit basis. However, it is desirable to avoid "those disadvantages of a rigid civil service system which spring from too much uniformity due to too large a unit of administration." The government corporation needs freedom in making purchases and freedom from rigid regulations concerning bids and the acceptance of them. It should be liable for its torts. The ordinary method of providing initial capital for a government corporation has been by the issuance of capital stock subscribed in whole or in part by the government. This method seems necessary in most cases. Should the bonds of such a corporation be guaranteed by the government? Opinions differ but most American writers oppose it as likely to involve too much legislative control over corporate affairs. Also government credit may be endangered. The corporation should have the responsibility for meeting its fixed capital charges. When the national government engages in business sometimes there is a loss of revenue by state and local tax units. No general policy has been established for the solution of this problem. Any such policy will be subject to considerable variation and payments by the national government need not continue beyond a period necessary for state and local governments to make necessary adjustments.

## Law and Economics

*Financial Democracy,* by Cyrus S. Eaton; *For a Free-Market Liberalism,* by Henry C. Simons; *Bottlenecks (Union-Made Included),* by James Angell McLaughlin; in 8 University of Chicago L. Rev. 195, 202, 215. (February, 1941.)

Eaton reviews a collection of addresses made by Commissioner William O. Douglas, now a justice of

the Supreme Court. Pleased with their contents, the reviewer states some of his ideas. (1) Finance should be the servant, not the master, of commerce. If it is the master, economic progress is sacrificed. (2) Regional finance, with perhaps the Federal Reserve System as a model, should be developed to offset the monopoly of the New York banking houses. (3) Competitive bidding for securities, instead of a monopoly for favored bankers handed down from generation to generation, is advocated. Simons thinks well of Thurman Arnold's latest book even though he points out that "hokum and engaging half-truth" are present. Broadly interpreted, the book "is an earnest plea for restoration of free markets in the United States." However, it is not expected that a large or permanent solution of monopoly will be effected under present procedure or under existing legislation. Our corporation and patent law needs complete overhauling. The labor monopoly should also be abolished. But these are questions that Arnold would be unwise to raise. Yet, "the great ideological conflict of the modern period is (was?) between English free market liberalism of the early 19th century and a German politico-economic creed which stressed state control of economic life and industrial development. Germany never accepted English liberalism; and even her best scholars rarely understood Adam Smith and Jeremy Bentham and the tradition of thought identified with them. On the other hand, the German creed was always congenial to our own powerful minorities, seeking special favors from the State, and to politicians who lived by such dispensations." According to McLaughlin, "Arnold is doing an important piece of work and doing it well, probably better than it has ever been done before." Yet he is highly critical of his book. "The fact seems to be that Mr. Arnold is temperamentally incapable of making an accurate statement."

### Trade Regulation

*Bituminous Coal And The Public Interest,* by Eugene V. Rostow; *Coal And The Economy—A Demurrer,* by Walton H. Hamilton; *Joinder in Demurrer,* by Eugene V. Rostow, in 50 Yale L. Jour. 543. (February, 1941.)

Seventy-eight pages of thoughtful and informed writing on a complicated problem! Says Rostow: The Bituminous Coal Act of 1937 is an experiment that failed and it should not be renewed. Over-production nor overcapacity satisfactorily explains the depression in the coal industry during the twenties. Rather, the chief factor was the struggle for business between the unionized northern fields and the newer, not unionized, fields of West Virginia, Eastern Kentucky, and Virginia. Even though the NRA "was one of the two or three major calamities of the New Deal," still it resulted in almost complete unionization of the coal miners. What is wrong with the Act as administered? (1) It is a costly experiment. (2) It freezes the status quo as of 1937, thus restraining competition and shifts in the distribution of business. (3) The price fixing policy is not adapted to the needs of the coal industry since it does not provide for control of production. What is desired? Answer: a steady increase in the total output of the goods and services that people want. How secure the desire? "Government spending and an imaginative enforcement of the anti-trust laws; these two together are twin weapons of great power in the struggle for expansion." Hamilton replies: "although I am quite in accord about objectives, I am compelled to demur to the plan of salvation." The bituminous coal industry is distinctive. The largest expenses are for wages and freight. The first is subject to collective control by the union and the other is regulated by the Interstate Commerce Commission. The necessity for the third price control, provided in the Coal Act, seems apparent. But Hamilton is filled with caution. To him both coal control and the spending program are novel; "neither has as yet hit upon just that detail of policy through which its objective is to be gained." Yet there is faith that the Coal Act "points a way. It is a step toward a policy for a vital natural resource." Rostow responds: Wage fixing is undertaken for the social protection of the worker and that policy should go forward. Freight rates are the charges of a monopoly and control over them is needed for reasons that do not exist with highly competitive coal prices. So there is no proper analogy for fixing coal prices. Neither does a higher price for coal promise conservation. The way to obtain conservation is through detailed mining regulations and inspections.

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## Our "Second Language"

[*Lawyers generally have a growing interest in South America and therefore in the Spanish language. Young lawyers entering Government service find a knowledge of Spanish demands a premium. Accordingly the following item, clipped from the* Chicago Daily Law Bulletin, *and by it taken from the* New Orleans Times Picayune, *will be read with interest.—Ed.*]

"What the National Catholic Educational Association was told here about the urgent importance of concentrating on the Spanish language and Spanish-American, or Latin American, history in college and university instruction, applies just as forcibly to all religious and secular educational institutions, and to high schools of every character. The advocate, the Rev. William F. Cunningham, C. S. C., general vice president of the association, is a native of Wisconsin and a member of the faculty of Notre Dame University in Indiana, but he has apparently a clearer conception of the needs of Pan-American relations in terms of spoken and written communication than many educators who reside on the threshold of central and southern America.

'Spanish must become our second language, as English is already accepted as the second language in the schools in many of the Spanish-speaking countries,' said the Rev. Mr. Cunningham. To that, amen."

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## Criminal Contempts

THE OPINION of the Supreme Court of the United States in the *Nye and Meyers* case is likely to rival the *Erie Railroad* case in the extent to which it is discussed.

The case is reviewed in this number. It is therefore only necessary here to say that persons acting in the interest of the defendant in an action for alleged wrongful death, plied the plaintiff with liquor and importunities and by this "improper conduct" caused him to sign and mail to the district judge a letter stating that he desired to have the case dismissed. He was also persuaded to sign a final report as administrator to the end that he should be discharged and become disqualified to carry on the litigation.

The acts which constituted that "improper conduct" were all done more than one hundred miles away from the court house where the action was pending. The letter to the judge and the final administrator's report reached their respective destinations. The Supreme Court reversed a judgment of the Circuit Court of Appeals which had affirmed a judgment of the district court imposing a fine for contempt of that court.

Since the litigation is still pending and the last word has not yet been said, it will of course be clearly understood by lawyers that nothing herein contained is to be taken as an expression of approval or disapproval of either the prevailing or dissenting opinion. The sole purpose of the discussion is to promote the consideration of some of the important questions involved.

It should first be observed that the action taken to punish the wrongful conduct shown by the record under review, was founded upon a provision of the Federal statutes. It did not involve the exercise of any of those powers vested in the court at common law or by statute, to enforce obedience to their orders by contempt proceedings in civil actions. The scope of the opinion is confined to "criminal contempts." There has been some confusion as to the distinctions between civil and criminal contempts and the opinion renders a distinct service in making those distinctions clear. On this point there was no dissent.

The opinion does not deprive the courts of all power to punish summarily criminal contempts. If an evildoer, in the presence of the court, tampers with witnesses, jurors, or parties, he can still be summarily dealt with and the evil designs thwarted without the delay and uncertainty of an indictment and criminal prosecution.

It cannot be denied that a literal interpretation of the statute lends support to the conclusion of the majority that the words "so near thereto as to obstruct the administration of justice" connote "physical proximity."

On the other hand, however, the dissenting opinion of Mr. Justice Stone, in which the Chief Justice and Mr. Justice Roberts concurred, derives from the same words a connotation of causal relationship.

The act of Congress here involved, to which learned judges give such various interpretations, arose out of the following circumstances. As a result of alleged arbitrary and oppressive conduct of a district judge, more than a century ago, and because of the disclosures in the proceedings for his impeachment, in which the judge was found "not guilty," the House directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States and also to limit the punishment of the same." As a consequence of that action the statute of 1789, which was little more than declaratory of the common law, was amended March 2, 1831 and has remained as then enacted without change in the respects here involved.

It now seems that from the language employed by Congress in the Act of March 2, 1831, consequences may have followed other than the definition of offenses which may be punished as contempts and the limitation of punishments.

Perhaps Congress may have intended to limit the right of the court to punish summarily, only those criminal contempts actually and openly committed in the presence of the court, the immediate repression of which is necessary to preserve order and decorum during the sessions of courts. It is possible on the other hand that Congress did not intend to draw distinctions between one who bribes a witness in court and one who bribes him before he reaches the court room. Perhaps all criminal contempts should be punished only by indictment and prosecution with the right of trial by jury or perhaps such a change in the law might sometimes reduce the judicial department to a condition of impotency.

Would it not be desirable that Congress should now clarify the statute pertaining to contempt proceedings and thus remove the doubts in which that subject is obscured? If that task is undertaken it will be wise to respect and leave undiminished, so much of the ancient and inherent power as is necessary for the prompt and efficient administration of justice.

# THE BEGINNINGS OF THE FEDERAL JUDICIAL SYSTEM

*[The research required for the following article was made as a part of the "background" investigation for the series of Chief Justices appearing on the Journal covers.—Ed.]*

THOSE LAWYERS who are in some respects archivists and who know the value of going back to original sources are always interested in the beginnings of our Federal Judiciary, including the Supreme Court. The best contemporary record (outside official documents) is found in the "Gazette of the United States." That was a bi-weekly newspaper which was started concurrently with the "new" Federal Government in 1789, and was continued as a "National Paper, published at the seat of Government," down to 1845. Early volumes of that paper are rare and are to be found only in a few archives and libraries.

### The First Electoral Vote Canvass

Before coming to an account of the Judiciary Department it will be helpful to give some account of the setting-up of the main Government itself. As is commonly known, the Congress of the Confederation, in providing for the bridge-over between the "old" and the "new" Governments, fixed March 4, 1789, as the date for the birth of the Government under the new Constitution. Accordingly the Senators (and presumably the Representatives) of the various states began assembling in New York City to take up their duties. The "Gazette" shows that a number of Senators actually met together on March 4, but the number being small, they adjourned from day to day until April 6, when a quorum was present for the first time. The first issue of the "Gazette" was printed nine days later, and the principal news item in it is headed as follows:

"CONGRESSIONAL AFFAIRS"
*"New York, April 15, 1789"*

The article recites that "through unavoidable delays" a quorum of the respective Houses "did not arrive in this City until Monday the 6th instant." A joint session of the two houses was organized that day, and the article continues:

"The votes of the Electors chosen by the several States were then opened and counted and were as follows, viz:

| | |
|---|---|
| "George Washington | 69 votes" |
| "John Adams | 34 votes" |
| "John Jay | 9 votes" |
| "John Rutledge | 6 votes" |

There were 8 other candidates who received scattering votes. These figures contain historical facts which are probably not generally known.

It also appears in that article that among the Senators was Oliver Ellsworth, from Connecticut.

### Future Chief Justices

For lawyers, the interesting fact disclosed by this record is that among the candidates who ran against General Washington, for first President, were two men whom he afterward appointed the first and second Chief Justices—John Jay and John Rutledge. Also, lawyers note with pride that among the first Senators was the architect and draftsman of the Act creating the Judicial Department, Oliver Ellsworth, who later became the third Chief Justice, and whose portrait adorns the cover of this issue of the JOURNAL.

### Judiciary Act of 1789

We come now to an account of the Judiciary Act, which as all lawyers know created the Judiciary Department of the Federal Government. For many reasons it is perhaps the most famous as well as most important single piece of legislation ever enacted by Congress. It is significant to know that a bill for that purpose became the very first order of business in the Senate, after the President and Vice President were declared elected. This is proved by the "Journal of the Senate" which is printed in abstract form in the "Gazette" (vol. 1, p. 220). The first paragraph of the Senate Journal reads:

"Tuesday, April 7, 1789"
"The Senate proceeded to elect a doorkeeper and James Mathers was chosen. *Ordered:* That Mr. Ellsworth [and 7 others named] be a Committee to bring in a bill for organizing the Judiciary of the United States."

### Debate on the Bill

For some reason, which is unexplained, there is no summary or even reference to the debates of the Senate, given in the "Gazette," for these early years. This is true not only of the Judiciary Act, but of all other matters. The debates of the House, on the other hand, are regularly given, either in summarized or extended form. There was evidently great popular interest in the proposed Judicial Department, because the debates on this bill are set out at greater length than for any other Act passed by the First Congress. The "Gazette" for October 29, and 31, 1789 devotes 10 full pages of newspaper size to this debate. Lawyers and others interested in the history of the Act will find these pages of the "Gazette" full of interest.

The Judiciary Act was "approved" by President Washington, September 24, 1789. It is printed in full in the "Gazette" for November 7 and 8 of that year, and covers two large pages of fine print. No other Act of the First Congress received anything like that space or attention.

### Organization of the Supreme Court

The next item of interest in the "Gazette" concerns the organizations of the Supreme Court itself, and is found in the issue of February 3, 1790. This is a matter which is discussed at another place in this issue of the Journal. [See p. 283.]

Such is the "story" of the beginnings of the Judiciary Department of the Federal Government. As lawyers well know, the Constitution itself left the matter of the Judiciary Department largely open. It was up to Congress and to the Supreme Court in its own way to frame and build that third branch of our Government.

U. A. L.

# THE SITUATION OF THE LAWYER IN GERMANY

By ARNO A. HERZBERG*

### Nazi Rule and the Lawyer

THE PROFESSION of law (down to recent times) had grown in Germany during centuries of struggle against autocracy and the almighty power of the state. Now Germany has been turned into a totalitarian state which means a much more intensive and stricter enforcement of the rule of the state over the individual; and a much more intensive penetration of all social relations than the pre-liberal state of the 17th and 18th centuries ever was able to exercise. The character of this new autocracy, the very nature of this state which claims an absolute and limitless power over the person and property of all its citizens, has deeply affected the institution of the lawyer. The question arises: Where there is no protection of person and property, where there is no free speech, where the state is able to do everything and to command everything without being restrained by constitution or law—what is the profession of a lawyer good for? Is there any place for the lawyer in the totalitarian system?

Eight years of Nazi rule have shown that the lawyer cannot be left untouched by a change in the fundaments of the state. As a semi-official he is closely connected with the fate of the state. A change in government can question his very existence.

### Prior Difficulties

There is no doubt that even before the Nazis came to power, the lawyers in Germany were faced with grave problems which originated in the years of the economic and spiritual crisis culminating in Hitler's victory. The crisis of 1929-32 caused many difficulties to an increasing number of lawyers. Incomes decreased although the number of cases in the courts grew steadily to an unprecedented scale. Most of the plaintiffs and defendants could not afford any fee. The cost of the advice and assistance of a lawyer was, by law, considered as belonging to the facilities the state has to keep at the disposal of its citizens. Therefore the state paid the lawyer but naturally on a very reduced scale. This shift in the income of the lawyer due to unemployment and impoverishment, together with an increasing number of laws which excluded the lawyer from pleading in special courts (as the lower courts dealing with labor disputes) and the ever growing number of lawyers, all seemed menacing to the profession. The older lawyers did not know, despite their experience, of any remedy.

*Now a resident of the United States, in New Jersey. Studied law, economics, sociology and journalism at Universities of Berlin and Heidelberg, Germany. J.U.D. Heidelberg (1931). Practiced law in Germany, but was forced to abandon career as a lawyer in April 1933. Came to this country in September 1938. Declared immediately intention to become an American citizen. At present employed in a manufacturing company.

### Hitler Stops Study of Law

It was one of the first steps Hitler took after his accession to power to stop the flow of students from the high schools to the universities and, later, practically to block admission to the bar. After the new regulations of this sort became effective, only 16 lawyers were admitted in Berlin during the whole year of 1936. Moreover the lawyers got rid of the competition of all those who ever had defended communists in court or were in favor of the old regime. Besides that all Jewish lawyers, with the exception of those who had participated in the World War as front-line soldiers or were admitted to the bar before the World War, were ousted. Even these exceptions were cancelled some years later, and the whole profession was cleared of Jews.

### Conservative Lawyers Approved of Hitler

Most of the lawyers belonged, at least outside of Berlin, to conservative circles. They liked the way Hitler handled their problems. They did not mind the fact that numerous young lawyers who had turned Nazi when they studied at the universities, left the profession to become state officials. For years these old lawyers had repeated over and over again, that the future of the whole profession was hopeless and the time bound to come where the young lawyers had to turn to other occupations. It was a tragic situation. When the lawyers advised their young colleagues to stay away from the profession, because things were hopeless, they did not intend to arouse these young men to a political and professional change. But nevertheless that was the result, and it was a change which was so thorough that the profession of the lawyer in its usual sense is dead in Germany today.

### Legal Profession Is Dead

Nazi-Germany has, step by step, decreased the influence and the activities of the lawyer and it has been clearly shown that there is no place for the lawyer as a product of Liberalism in a totalitarian system of state autocracy. The older lawyers, at first so pleased with the measures Hitler took, have become aware of the fact that they are superfluous. The lawyer today could be eliminated in Germany without hampering the activities of the courts or the economic life of the nation.

### Court Activities Reduced

To begin with an outstanding fact: contrary to the time before 1933 the number of cases has so enormously decreased in the years of rearmament and development of a war economy that the courts have actually nothing to do compared with that time of the economic crisis. This is due to three reasons:

1) The totalitarian state regulates the economic life so completely that every businessman has his orders

how to act and what to do. The regulations of the German war economy embrace everything. There is not a single sphere of activities, even the seemingly negligible ones, left without such a regulation and rationing. Regulation and rationing are supervised by professional organizations which have semi-official or official character, established for every kind of business.

2) These professional organizations have the power to arbitrate cases among their members so that less cases come to the courts. It is to be noted that the kind of men who used the courts in former times, businessmen, peasants, and artisans, are within the framework of such organizations.

3) On account of the regulation and rationing of materials and merchandise, we find today in Germany a smaller number of businessmen and industrialists. A shift within the population has taken place. Businessmen who had to close down their stores for lack of merchandise or artisans, became workers, themselves. The shortage of labor in the war economy produced an elimination of a free labor market; and the worker can be sent anywhere he is needed with or without his family.

### Nazi Economy Irons Out Disputes

The totalitarian state has the tendency to iron out all complications within the economy. Just during this war many regulations have been established to freeze credits, to block the way to the courts and to force creditors to abstain from their claims if the debtor is in the army. Besides these new regulations of the government which naturally eliminate the lawyer, it is the policy of the Nazi Party as the backbone of the Nazi State to replace the lawyer and the court by its own institutions. Since 1933 the Nazi Party established so called "Rechtshilfestellen" over the whole country. These organizations are supposed to help the little man in legal matters and to settle cases outside of the courts. Many former lawyers were absorbed in this organization where they are employees like any other clerk.

### Effect on the Law Itself

It is a big change which has taken place. Not only so far as the activities of the lawyer are concerned, who finds his sphere of influence curtailed in every respect. He has to adapt himself to a new situation, too, if he considers the law itself. In the German view, the Fuehrer alone is the single source of law and his statements and speeches are equal to a legal interpretation of the existing law. The lawyer has to read these speeches and declarations as carefully as a law. He has to acquaint himself with legislation which is turned out by the state machine in high gear. He has to know the old established law which has not been changed so far and the new steadily changing laws in the formulas of the Nazi doctrine. It is the aim of the lawyer to outshine his fellow-lawyer and even the court in the applying of such formulas. Therefore, we find sentences in judgments which are clearly political. Before Hitler came to power the old lawyers complained that the laws were changed too often and the outcome of a case uncertain in every respect. They missed the firm authority of the courts. Today the lawyers have stopped complaining. Judges and lawyers, eager to see to it that their personal position is not endangered or their advancement hampered by lack of thoroughness in carrying out orders of the Nazi Party are aware that any criticism is not possible. If they are Nazis—and most of them are—they approve existing conditions; if not, they are forced to keep quiet because the German Secret Police (Gestapo) would not admit any kind of disapproval, not to speak of the professional organization of the lawyers which is able to deprive any lawyer of his license. The Gestapo plays an important part in the life of a lawyer. The Gestapo is at the same time persecutor, judge and lawyer. The Gestapo interferes with everything. Inside of Germany the Secret Police is the true ruler.

### Unpublicized Restrictions

The lawyer is forbidden by law to assist Jews. But he is hampered in more than one way by regulations which are not published but which are only known to members of the bar. It is hard for an American lawyer to believe what an atmosphere of personal ambition, fear, and mimicry, dominate the life of a German lawyer. No German lawyer would dare to advise any client where any political question is involved. In Germany the most innocent question can be turned political. No German lawyer would dare not to comply with the doctrines of the Nazi Party, and even in his private life not to obey the official orders. The lawyer takes part in rallies. He has to shout as everybody has and he has to give up his personal feelings if the orders of the Nazi Party or his professional organization demand that. Any other view is a crime against the German people.

Even in court the lawyer has to see to it that these written and unwritten regulations and doctrines are exercised. In each sitting of a court where cases with "political" aspects come up, agents of the Gestapo are present. If a sentence is not satisfying to them, they step in, arrest the persons involved before the eyes of the judges and correct any sentence by means of the concentration camp. The most famous case of that sort is that of Pastor Niemoeller who was acquitted by the court before whom he was tried, but taken to a concentration camp after the acquittal became effective. If the Gestapo asks for an acquittal, every party "renounces" his claim or even does not bring it before the court.

### Profession of Law Ruined

Under such circumstances where the courts are superfluous, the lawyer is superfluous, too. No wonder that the profession is declining in numbers and in influence. There is no use for a lawyer in Germany. The totalitarian state can do without him. Where freedom of speech and freedom of the individual are abolished, there is no room for a lawyer. If one profession in particular was ruined by the Nazis, it is the profession of law.

# REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

**Courts—Proceedings for Contempt. Power to Punish**

**Under Section 268 of the Judicial Code the power of a district court to punish summarily for indirect contempts does not extend to acts of misbehavior performed at a place remote from the presence of the court. The qualifying words of that section "or so near thereto," i.e., so near to the presence of the court, as to obstruct the administration of justice, are construed as connoting a geographical or physical proximity rather than a causal relationship.**

*Nye v. United States,* Adv. Op. —; 61 Sup. Ct. Rep. 810, U. S. Law Week, 4280. (No. 558, decided April 14, 1941).

By a divided bench, the Supreme Court reversed a summary adjudication of contempt rendered against the petitioners by a District Court, under Section 268 of the Judicial Code. The contempt found to have been committed arose from acts of the petitioners in inducing one Elmore, an illiterate, feeble in mind and body, to sign papers for the dismissal of an action for the death of his son through the use of certain medicine. The petitioners induced Elmore to act by the use of liquor and persuasion. These acts all took place more than 100 miles from where the trial court was sitting.

The respondent, Guthrie, who had been appointed by the trial court to represent Elmore, moved for an order to show cause why the petitioner, Nye, should not be attached and held for contempt. Both petitioners answered, and after hearing they were found to have engaged in "misbehavior so near to the presence of the court as to obstruct the administration of justice," and were fined.

An appeal was taken to the Circuit Court of Appeals, which affirmed the judgment.

On certiorari, the Supreme Court first considered certain procedural questions. The first of these was whether this was a civil or a criminal contempt. It concludes that it was criminal. The next question was whether the case was governed by the Criminal Appeals Rules, and the Court holds the appeal was not governed by those Rules. Finally since this ruling means that the appeal was governed by Section 8(c) of the Act of February 13, 1925, the question was presented whether the Circuit Court had jurisdiction to decide the merits, in the absence of an allowance of the appeal. On this question the Court was equally divided, so that the Supreme Court found it necessary to consider the merits.

On the merits, the majority, in an opinion by MR. JUSTICE DOUGLAS, voted to reverse the judgment. The opinion reviews the legislative history of Section 268, and stresses that the intent of the legislation was to curtail the exercise of power to punish for contempt, which was undefined under the Act of 1789. The need for the legislative definition, which was adopted in 1831, had been dramatized in the impeachment proceedings against Judge Peck in that year for his punishment of one Lawless for publishing a criticism of one of the Judge's opinions in a case which was on appeal. *Toledo Newspaper Co. v. United States,* 247 U. S. 402, is also discussed, and occasion is taken to criticize the doctrine there expressed of a "reasonable tendency" to obstruct justice, which doctrine tends to impair the effort of Congress to limit the power to punish summarily for contempt.

In view of this legislative and judicial background the majority considers the statutory language which sanctions contempt proceedings for misbehavior in the presence of the courts "or so near thereto as to obstruct the administration of justice . . ." The words "so near thereto" are construed to be geographical rather than causal in their effect. On this point MR. JUSTICE DOUGLAS says:

> Mindful of that history, we come to the construction of Section 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words "so near thereto" have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. In *Ex parte Robinson* . . . , it was said that as a result of those provisions the power to punish for contempts "can only be exercised to insure order and decorum" in court. "Misbehavior of any person in their presence" plainly falls in that category. . . . And in *Savin, Petitioner,* . . . it was also held to include attempted bribes of a witness, one in the jury room and within a few feet of the court room and one in the hallway immediately adjoining the court room. . . . The phrase "so near thereto as to obstruct the administration of justice" likewise connotes that the misbehavior must be in the vicinity of the court. . . . It is not sufficient that the misbehavior charged has some direct relation to the work of the court. "Near" in this context, juxtaposed to "presence," suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the court. Broad categories of such acts, however, were expressly recognized in Section 2 of the Act of March 2, 1831 and subsequently in Section 135 of the Criminal Code. It has been held that an act of misbehavior though covered by the latter provisions may also be a contempt if committed in the "presence" of the Court. . . . Yet in view of the history of those provisions, meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted. If "so near thereto" be given a causal meaning, then Section 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. . . . If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a "reasonable tendency" to "obstruct the administration of justice" . . . , then the conditions which Congress sought to alleviate in 1831 have largely been restored. . . . The result will be that the offenses which Congress designated as true crimes under Section 2 of the Act of March 2, 1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew.

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

MR. JUSTICE STONE delivered an opinion in favor of affirming the conviction. In his opinion, after discussing the reasoning of the majority, MR. JUSTICE STONE states his position that "so near thereto" should be construed to connote a causal relationship as well as geographical proximity. In this connection he says:

> These contentions assume that "so near thereto" can only refer to geographical position and they ignore the entire history of the judicial interpretation of the statute. "Near" may connote proximity in causal relationship as well as proximity in space, and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances. This Court has hitherto, without a dissenting voice, regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court. . . . Contempts which obstruct justice because of their effect on the good order and tranquility of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, must be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute.

THE CHIEF JUSTICE and MR. JUSTICE ROBERTS concurred with MR. JUSTICE STONE.

The case was argued by Mr. Lycurgus R. Varser for the petitioners and by Mr. Herbert Wechsler for the respondent.

### Eminent Domain—Compensation for Damages Consequent on Improvements to Navigability of Streams

**Structures located between high and low water marks of a navigable stream are placed there at the owner's risk and are subject to be injured or destroyed without compensation by the Government, in the exercise of its power to improve the navigability of the stream, even though the structures in question are not obstructions to navigation.**

*United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 85 Adv. Op. 713; 61 Sup. Ct. Rep. 772, U. S. Law Week, 4267. (No. 535, decided March 31, 1941).

The question raised in this case was whether United States must compensate a riparian owner for injury to structures located between high and low water marks, where the damage is caused by the raising of the water level in a navigable stream to improve navigation. Due to conflicts in the decisions of the Court, it granted certiorari.

Part of the tracks of the respondent railroad and of the pole lines of the respondent telegraph company are on an embankment on the westerly side of the Mississippi River. The embankment was protected by riprapping adequate in times of high water.

In the prosecution of improvements to navigation the United States constructed locks and dams in the upper reaches of the river. One of the dams raised the water level from 5.6 to 7.5 feet above ordinary high water mark and the respondents were compelled at certain points to add more riprapping. In condemnation proceedings, the District Court held that the Government was bound to compensate for injury to all segments of the embankment, whether between low and high water marks, or not, and the Circuit Court affirmed.

The respondents asserted that the power of the Government to take private lands, without compensation to improve navigation is limited to the natural widths, levels and flows of the river, and that compensation must be made if more is taken. They urged that the embankment can be injured without compensation only if it constitutes an encroachment and thus a hindrance or obstruction to navigation. The Government insisted that it was not confined to the mere making or clearing of channels and the removal of hindrances or obstructions to navigation, but that its power embraces the use of every appropriate means of improving navigation, to alter the level of the stream up to the ordinary high water mark.

The general rule governing this class of cases is stated as follows by MR. JUSTICE ROBERTS:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

Admitting this to be the general rule, the respondents insisted that it has been applied only in cases where the control of the Government was exercised to extend the area of practicable navigation either by constructing channels or removing obstructions to navigation. They asserted that *United States v. Lynah*, 188 U.S. 445, and *United States v. Cress*, 243 U.S. 316, sanction a different principle where the improvement consists in the raising of the level of a stream to the injury of structures erected by the riparian owner between high and low water mark.

The opinion distinguishes the *Cress* case. The *Lynah* case is rejected as not expressing the law.

Stating the applicable rule, MR. JUSTICE ROBERTS says:

> It is not true, as respondents maintain, that only structures in the bed of a navigable stream which obstruct or adversely affect navigation may be injured or destroyed without compensation by a federal improvement of navigable capacity. On the contrary, any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed; and the right to compensation does not depend on the absence of physical interference with navigation. The *ratio decidendi* and the circumstances disclosed in numerous cases lead inevitably to this conclusion.

The judgment was reversed and remanded for the trial of certain issues of fact.

The case was argued by Mr. Assistant Attorney General Littell for the Government and by Mr. A. C. Erdall for the respondents.

### State Police Power—Regulation of Parades on Public Streets

**In the exercise of the state's police power, a municipality may control the use of its public streets by requiring the procuring of a license for the use thereof for a parade, as a condition precedent to the use. Statutory provisions conferring authority on the licensing body do not infringe the rights of freedom of worship, freedom of speech and press or freedom of assembly, where the authority is to be exercised without unfair discrimination and on considerations as to time, place and manner of conducting a parade in relation to other uses of the streets.**

*Cox v. New Hampshire,* 85 Adv. Op. 702; 61 Sup. Ct. Rep. 762, U. S. Law Week, 4275, (No. 502, decided March 31, 1941).

The power of the state to regulate parades on public streets in its relation to the rights guaranteed by the Fourteenth Amendment is considered in this case. The appellants are five "Jehovah's Witnesses." They, with sixty-three others, were convicted in the municipal court of Manchester, New Hampshire, for violating a state statute forbidding a parade or procession upon a public street without a special license.

The sixty-eight defendants and others met at a hall in Manchester. They were divided into four or five groups, each with about fifteen to twenty persons. Each group proceeded to a different part of the business district of the city and there lined up in single file and marched along the sidewalks carrying signs. They did not apply for a permit and none was issued. The questions as to the defendants rights of freedom of worship, freedom of speech and press, and freedom of assembly, and whether the exercise of these rights can be subjected to governmental licensing were duly raised at the trial. The statute was sustained and on appeals through the state courts the conviction of the appellants was affirmed.

On an appeal to the Supreme Court the judgment was unanimously affirmed in an opinion by MR. CHIEF JUSTICE HUGHES.

The general power of municipalities to regulate the use of public highways consistently with civil liberties is described in the opinion as follows:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safe-guarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

As to whether the power has been exercised consistently with civil rights in the instant case, the Court cited the opinion of the state court to the effect that the licensing board is not vested with an unfettered discretion or arbitrary power, but that its discretion must be exercised with uniformity of method of treatment on the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. In view of this and other statements of the state court, MR. CHIEF JUSTICE HUGHES concludes that the authority conferred by the licensing provisions is constitutional, saying:

> If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

A further point considered was whether the Act is valid insofar as it permits variations in the license fees, with a permissible range from $300 to a nominal amount. The Court finds no basis for the contention that only a uniform fee is permissible, in view of the varying conditions and expenses to be met in the maintenance of public order through the proper policing of parades.

No issue as to peaceful picketing or interference with religious worship or religious practice was found in the case, but only the exercise of local control over the use of streets for parades and processions.

The case was argued by Mr. Hayden Covington for appellants and by Mr. Frank R. Kenison for appellee.

### Anti-Trust Laws—Suits for Treble Damages under Sherman Act—Status of United States

**The United States is not a "person" within the meaning of Section 7 of the Sherman Act, and cannot maintain a civil action thereunder for treble damages against a violator of the Act.**

*United States v. The Cooper Corporation,* 85 Adv. Op. 667; 61 Sup. Ct. Rep. 742, U. S. Law Week, 4268, (No. 484, decided March 31, 1941).

In this case the Court considered the question whether the United States may maintain an action for treble damages under Section 7 of the Sherman Act.

The complaint charged an illegal combination and conspiracy on the part of the respondents to fix collusive prices of articles purchased by the United States and alleged money damages of three times the amount of the injury sustained. The District Court dismissed the complaint on the ground that the United States is not a person within the meaning of Section 7 of the Sherman Act. The Circuit Court of Appeals affirmed.

Section 7 provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act," may sue in certain federal courts and recover treble damages for the injury sustained, with costs.

The Supreme Court by a divided bench affirmed the

judgment. MR. JUSTICE ROBERTS delivered the majority opinion.

The opinion observes that in common usage the term "person" does not include the sovereign, and that statutes employing the term are ordinarily construed as excluding it. It is noted also that the Government admitted that often the word "person" is used in such a sense as not to include the sovereign but urged that where, as here, its wider application is consistent with the public policy evidenced by the law, the word should be held to embrace the Government.

Emphasizing the duty of the Court to construe the Act rather than to legislate, this position of the Government is rejected. It is noted that the term "person" is used several times in the Act and that the usage in some instances clearly excludes the United States. The opinion indicates that the meaning throughout should be regarded as uniform.

The scheme and structure of the legislation are cited in arriving at the interpretation adopted. From this aspect the division of the legislation into criminal and specific civil remedies which are conferred on the Government is stressed. On the other hand, a civil action for injury to property rights is granted to redress private injury. Citing this division of remedies in support of the construction adopted, MR. JUSTICE ROBERTS says:

> It seems evident that the Act envisaged two classes of actions —those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. (Citing prior decisions.) We were compelled to answer that Congress had not seen fit so to provide. For the like reasons we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy.

In addition the opinion cites in support of its conclusion certain supplemental legislation, various judicial expressions, the legislative history of the Act and the fact that during fifty years of the statute's existence no action has heretofore been brought by the United States under Section 7.

MR. JUSTICE BLACK delivered a dissenting opinion in which MR. JUSTICE REED and MR. JUSTICE DOUGLAS joined.

In this opinion emphasis is placed on the fact that the Government is a large purchaser of goods and that in that capacity it may be injured by price-fixing, which is illegal under the Sherman Act. In this view, it is argued that it is a strange and unfortunate construction which gives greater protection against collusive prices to every other purchaser than to the United States itself. In stressing this position, MR. JUSTICE BLACK says:

> Here, among the evils legislated against was price-fixing by combination, and among the remedies afforded was the giving of a right of action to purchasers injured by prices so fixed. The result of this case—denying to the largest single purchaser of all goods manufactured and sold in the nation the protection afforded by this legislation—is to restrict the remedy in such way that the evil aimed at is less likely to be suppressed. For the construction given the Sherman Act, insofar as sales to the government and civil damages are concerned, enables those guilty of violating it to elude its provisions, escape its consequences, and defeat its objects.

MR. JUSTICE MURPHY did not participate.

The case was argued by Mr. Hugh B. Cox for the Government and by Mr. Luther Day for the respondents.

### Jurisdiction of Federal District Courts—Suits Against the United States—Federal Procedure—Capacity to Sue and be Sued

**The United States district court is without jurisdiction to entertain a suit by a state judgment creditor against the United States for damages for breach of its contract with the judgment debtor under a state court order authorizing such an action pursuant to state statute.**

**Nothing in the Federal Rules of Civil Procedure so far as they may be applicable in suits brought in district courts under the Tucker Act authorized the maintenance of any suit against the United States to which it has not otherwise consented.**

*U. S. v. Sherwood,* 85 Adv. Op. 696, 61 Sup. Ct. Rep. 767, U. S .Law Week, 4272, (No. 500, decided March 31, 1941.)

This action was brought in the district court for the Eastern District of New York by a judgment creditor of one Kaiser, against whom a New York court had awarded judgment, to recover from the United States for breach of its contract with Kaiser for construction of a post office building. The state court had entered an order authorizing the suit and directing that out of the recovery, the creditor should retain enough to satisfy his judgment with costs and disbursements. The order was made under §795 of the state civil practice act which sanctions orders by the state court authorizing suit by judgment creditors against persons indebted to them. The district court dismissed the complaint for want of jurisdiction, but the circuit court reversed on the ground that under Rule 17 (b) of the Federal Rules of Civil Procedure the plaintiff's capacity to sue was governed by the law of New York which was his domicile, and the order of the state court conferred authority to maintain the suit since the United States was a "person" within the meaning of the state statute.

The Court's opinion by MR. JUSTICE STONE holds that the district court was without jurisdiction to entertain the suit. It first reviews the history and purpose of the Tucker Act, pointing out that it relaxes the sovereign immunity of the United States to suit on contracts, and confers on the district courts concurrent jurisdiction with the court of claims of certain contract claims not exceeding $10,000. It then concludes that the present suit could not have maintained in the court of claims. The reasoning on this point is shown in the following excerpts from the opinion:

> The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts . . . of the United States," which it is free to exercise through judicial as well as non-judicial agencies. . . .
>
> Except as Congress has consented there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. . . .

> We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract. As the court below recognized, the judgment debtor, who is made a necessary party by §795 of the Civil Practice Act, in any suit brought pursuant to the order of the state court is entitled to attack the validity of the order and of the judgment on which it is founded. Adjudication of that issue is not within the jurisdiction of the Court of Claims whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against the Government alone.

The opinion then examines the question whether such a suit may nevertheless be brought in the district court and concludes that it may not. It had been contended that the obstacle to joining private parties as defendants in suits against the government were procedural only, and the court of claims was free to adopt such a procedure. This had led to the argument that in any case such a procedure for joinder was now available in the district courts under the Federal Rules of Civil Procedure, and since district courts have jurisdiction of suits against both private parties and the Government, the rules authorize the exercise of both jurisdictions in a single suit. In denying these arguments, the opinion proceeds as follows:

> This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 723, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.
>
> Nor with due regard to the words of §2 of the Tucker Act and to its legislative history can we say that the United States has consented to the maintenance of suits against the Government in the district courts which could not be maintained in the Court of Claims. The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted. . . . Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be "concurrent" with that of the Court of Claims.

The conclusion thus reached made it unnecessary to decide the question on which the second and fifth circuits are in disaccord, as to whether or not the new federal rules are applicable to suits against the United States under the Tucker Act.

The judgment of the circuit court was reversed.

The case was argued on March 6th and 7th, 1941, by Mr. Sidney J. Kaplan for the petitioner and by Mr. Milton U. Copland for respondent.

## SUMMARIES

### Federal Procedure—Jurisdiction of Three Judge Federal District Court—Assessment of Damages when Injunction Improperly Granted

*Public Service Commission of State of Mo. v. Brashear Freight Lines,* 85 Adv. Op. 717, 61 Sup. Ct. Rep. 784, U.S. Law Week 4264. (No. 549, decided March 31, 1941).

Certiorari was granted in this case to determine questions relating to the power of a three judge district court specially constituted pursuant to §266 of the Judicial Code, to assess damages allegedly caused by a temporary injunction issued by the court but later dissolved on final hearing. The original action was to enjoin as unconstitutional the Missouri Bus and Truck Law. A single district judge granted a temporary restraining order; the defendants counterclaimed for fees, licenses, etc., due under the Act, and a three judge court was convened, found the law to be constitutional, dissolved the restraining order, dismissed the action, and ordered the counterclaim dismissed without prejudice because of "serious doubt as to the right of defendants to maintain the action." The defendants then asked the three judge court for assessment of damages and costs. This was denied.

The Court's opinion by MR. JUSTICE BLACK states the following conclusions;

(1) That the motion for damages raised questions not within the purpose for which the two additional judges are called, namely to limit applications for injunctions restraining state officers from enforcing state laws or orders on the ground of repugnancy to the Federal Constitution. The opinion concludes, however, that this participation of three judges does not in itself invalidate the court's action.

(2) That the dismissal of the counterclaim did not adjudicate the issues raised by the motion to assess damages and the action of the district court cannot be supported on this ground.

(3) That there is no merit to the claim that the enjoined state officials were not proper parties to seek damages due to the injunction. The opinion states that the Attorney General of the state, who was one of the officials enjoined, is in any event empowered to sue for the state. It also points out that the plaintiffs are not in a good position to make the argument since they claimed the injunction originally against these officials on the basis of threatened collection of the fees by them.

(4) That under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties injured by injunctions ultimately determined to have been improperly granted. The opinion concludes, however, that in this case the circumstances called so strongly for assessment by equity, that the court erred in dismissing the motion.

The case was argued on March 10, 1941, by Mr. Daniel C. Rogers for petitioners and by Mr. Kenneth Teasdale for respondents.

### Limitations of Actions—Applicability of State Decisions in Federal Actions—Railway Labor Act

*Moore v. Illinois Central Railroad Co.*, 85 Adv. Op. 722, 61 Sup. Ct. Rep. 754, U. S. Law Week 4266. (No. 550, decided March 31, 1941).

Certiorari was granted here to review a judgment of the Federal Circuit Court of Appeals which held an action by a trainman for damages for wrongful discharge by the employer railroad in violation of a contract between the trainmen's union and the railroad to be barred by the Mississippi three year statute of limitations applicable to verbal contracts, rather than the six year statute applicable to written contracts. The Circuit Court's holding was contrary to the previous holding in the same action by the Mississippi Supreme Court before removal of the case to the Federal Court, that since the suit was on a written contract between the union and the employer for the plaintiff's benefit rather than on the verbal contract of employment, the six year statute applied.

The Court's opinion by MR. JUSTICE BLACK holds that the Circuit Court was bound to follow the decision of the Mississippi Supreme Court as to the Mississippi Statute of Limitations.

The opinion also examines the contention that the suit was premature because of failure of the employee to exhaust his administrative remedies under the Federal Railway Labor Act. As to this, the opinion concludes that the purpose of the Act was to establish a system for voluntary mediation and adjustment of disputes, and that there was no compulsion for the employee to seek adjustment of his dispute under the act as a prerequisite to suit.

MR. JUSTICE FRANKFURTER concurred in the result.

The case was argued on March 12, 1941, by Mr. James L. Byrd for respondent and submitted by Mr. George Butler and Mr. Garner W. Green for petitioner.

### Federal Motor Carrier Act—Rule-Making Power of Interstate Commerce Commission

*U.S. v. Resler*,—Adv. Op.—, 61 Sup. Ct. Rep. 820, U. S. Law Week 4279, (No. 616, decided April 14, 1941).

This appeal from the district court presenting two questions in the administration of the Motor Carrier Act of 1935: (1) Does subdivision (e) of §213 (exempting from the requirement of that section that authority be obtained from the Interstate Commerce Commission for mergers, consolidations, etc., consolidations in which the total number of vehicles involved is not more than 20) remove from the scope of §212 (b) (which requires that certificates or permits of convenience and necessity may be transferred pursuant to commission rules) transfers of operating rights involving not more than 20 vehicles; and (2) Has the Interstate Commerce Commission statutory authority to make a rule that the assent of the Commission is necessary to an effective transfer which is subject to §212(b).

The Court's opinion by MR. JUSTICE MURPHY, discussing the first question, concludes that, read together, §§212 (b) and 213 (e) mean that a transfer involving not more than twenty vehicles is governed by §212 (b) and the regulations under it, and that the proviso of §212 (b) "except as provided in §213" was intended to remove from the scope of §212(b) only those transfers within the compass of §213.

As to the second question, the opinion holds that the rule of the Commission requiring its approval of all transfers is a valid exercise of the rule-making power conferred by §212(b).

The case was argued on March 16, 1941, by Mr. Fowler Hamilton for the appellant and submitted by Mr. Harry S. Silverstein for appellees.

### Federal Income Taxation—Taxability to Donor of Trust Income Assigned by Him as Beneficiary Prior to Receipt

*Harrison v. Schaffner*, 85 Adv. Op. 694, 61 Sup. Ct. Rep. 759, U. S. Law Week 4274. (No. 437, decided March 31, 1941.)

Certiorari was granted in this case to determine whether the assignment by the life beneficiary of a testamentary trust of specified amounts of money from the income of the trust for the year following the assignment, paid by the trustees to the several assignees, is taxable income of the assignor or of the assignees.

The Court's opinion by MR. JUSTICE STONE holds that the income was that of the assignor. This conclusion is based upon the decisions in *Helvering v. Horst*, 311 U.S. 112, and *Helvering v. Eubank*, 311 U.S. 122, which hold that anticipatory assignments of interest, dividends, and rents payable to the donor, are within the statute taxing income "derived from any source" (§22 (a) of the Revenue Act of 1928) and that one who is entitled to receive interest or compensation for services, and who in advance of its receipt assigns it, receives income as if he had collected it and then paid it over to his donee.

The opinion points out that the technical distinctions involved in the conveyancing of equitable interests by which the assignee acquires a certain equitable estate in the trust property do not determine the operation of a taxing statute, which must be construed in accordance with its import and intent. Then, interpreting the statute in this view, the opinion concludes that a gift by a beneficiary of a trust of some part of the trust income for a specified period involves no such substantial disposition of the trust property as to camouflage the reality that he is enjoying the benefit of the income of the trust of which he continues to be the beneficiary, quite as much as he enjoys the benefits of interest or wages which he gives away.

The case was argued on March 4, 1941, by Mr. Arnold Raum for the petitioner and by Mr. Herbert A. Friedlich for respondent.

### Federal Procedure—Nature of Questions Certified by Circuit Courts—National Labor Relations Act

*NLRB v. White Swan Co.*, 85 Adv. Op. 710, 61 Sup. Ct. Rep. 751, U. S. Law Week 4260. (No. 529, decided March 31, 1941).

A certificate of the circuit court of appeals to the Supreme Court under §239 of the Judicial Code presented the following questions:

> 1. Should the National Labor Relations Act be interpreted as having application to a business of purely local character, such as a laundry, merely because such business is located in a city on a state line and derives a substantial portion of its income from business which involves collections or deliveries of articles in a state other than that in which the business is located?
>
> 2. Where a local business, such as a laundry, is located in a city on a state line, and is not engaged in interstate commerce, except in so far as it may collect articles to be serviced and may make deliveries to customers living across the state line, is such business, by reason of such collections and deliveries, deemed engaged in "commerce" within the meaning of Subsection 6 of Section 2 of the Act of July 5, 1935, ch. 372, 29 U.S.C.A. 152 (6), so that an unfair labor practice on its part would be an unfair labor practice "affecting commerce" within the meaning of Subsection 7 of said section (29 U.S.C.A. 152 (7)) and Subsection (a) of Section 10, 29 U.S.C.A. 160 (a).

The Supreme Court in an opinion by MR. JUSTICE DOUGLAS dismissed the certificate on the ground that the questions have an "objectionable generality" and do not "focus the controversy in its setting" since they were hypothetical and abstract in quality and did not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based. The opinion also concludes that even if they did reflect the Board's findings and conclusions, they would be defective as calling for a "decision of the whole case."

The case was argued on March 10, 1941, by Mr. Warner W. Gardner for the NLRB and by Mr. Herman C. A. Hofacker for the White Swan Company.

### Federal Income Taxation—Consideration Received for Cancellation of Lease as Gross Income—Capital Gains and Losses

*Hort v. Com. Int. Revenue*, 85 Adv. Op. 706, 61 Sup. Ct. Rep. 757, U. S. Law Week 4255. (No. 517, decided March 31, 1941).

Certiorari was granted in this case to determine whether in computing taxable income for income tax purposes, a taxpayer can offset the value of a cancelled lease against the consideration received by him for the cancellation.

The Court's opinion by MR. JUSTICE MURPHY holds that the entire amount received by the taxpayer for cancellation of the lease must be included as gross income.

The opinion also holds that the consideration received for cancellation was not a return of capital within the meaning of §23 (e) of the Revenue Act so as to permit the deduction as a capital loss under that section.

The case was argued on March 7, 1941, by Mr. Richard H. Demuth for respondent and submitted by Mr. Walter J. Rosston and Mr. Edwin Hort for petitioner.

### Income Tax—Status of Partnership Earnings on Death of Partner

*Helvering v. Enright*, 85 Adv. Op. 688; 61 Sup. Ct. Rep. 777, U. S. Law Week 4261. (No. 436, decided March 31, 1941).

*Pfaff and Wallace v. Commissioner of Internal Revenue*, 85 Adv. Op. 693; 61 Sup. Ct. Rep. 783, U. S. Law Week 4263. (No. 479, decided March 31, 1941).

Certiorari to review a judgment as to the status of partnership profits on the death of a deceased partner, under Section 42 of the Revenue Act of 1934.

The question was whether Section 42 permits the inclusion, as accruable items, in a decedent's gross income for the period ending with his death, of his share of profits earned but not yet received, of a partnership, when both the decedent and the partnership reported income on a cash receipts and disbursements basis.

The partnership agreement provided for termination of the partnership on the death of any partner and that his estate should have his partnership percentage of net monies then in the firm treasury plus his like percentage in outstanding accounts and the earned proportion of estimated receipts from unfinished business. Valuation was to be made by the senior surviving partner. The decedent's share in the uncollected accounts was valued at $2,055.55 and in unfinished work at $40,855.77. These amounts were reported for estate and inheritance tax purposes, but not in the income tax return made for the decedent for 1934 nor in the estate's income tax for any year.

The Court, in an opinion by MR. JUSTICE REED, concludes that the items are to be included under Section 42, and that the valuation of the partnership interest is an accrual of income which must be reflected in the income tax of the decedent for the period ending with his death.

A brief opinion by MR. JUSTICE REED disposes of a similar question in *Pfaff v. Commissioner*, No. 479, dealing with a medical partnership. The decision is rested on the authority of the *Enright case*.

The case was argued by Mr. Gordon Tweedy for the petitioners, and by Mr. James D. Carpenter, Jr., for the respondents in No. 436, and by Mr. Laurence Sovik for the petitioners, and by Mr. Gordon Tweedy for the respondent in No. 479.

### Income Taxes—Gains and Losses of Property Received Under Testamentary Trust

*Maguire v. Commissioner of Internal Revenue,* 85 Adv. Op. 676; 61 Sup. Ct. Rep. 789, U. S. Law Week 4256. (No. 346, decided March 31, 1941).

Certiorari to review a decision of the Circuit Court of Appeals, Seventh Circuit, dealing with the interpretation of Section 113 (a) (5) of the Revenue Act of 1928, in its application to property received by a taxpayer under a testamentary trust.

The decedent died in 1903 leaving a will creating a residuary trust in favor of the taxpayer. In 1905 the executors of the will were discharged and all the residue of the personal property was turned over to the testamentary trustees. In 1923 the trustees delivered the property to the taxpayer, part of it having been owned by the decedent and part having been purchased by the trustees during the term of the trust.

In 1930 the taxpayer sold certain parts of the property from both groups.

Affirming the Circuit Court, the Supreme Court holds, in an opinion by MR. JUSTICE DOUGLAS, that in computing the taxpayer's income, the gains or losses from the sale of the personal property under Section 113(a)(5) in the case of property received by the trustees from the executors the value at the time of delivery by the executors to the trustees controls; and in the case of property purchased by the trustees, the cost to the trustees governs.

The case was argued by Miss Helen R. Carloss for respondent and by Mr. Francis E. Baldwin for petitioners.

*Helvering v. Gambrill,* 85 Adv. Op. 681; 61 Sup. Ct. Rep. 795, U. S. Law Week 4258. (No. 472 decided March 31, 1941).

In addition to questions like those involved in *Maguire v. Commissioner,* No. 346, questions were presented as whether certain property had been held by the taxpayer more than two years and was a capital asset.

The respondent was remainderman of a trust created in 1897. The trust *res,* consisting of personalty, was delivered by the executors to the trustees in 1898. The life beneficiary died in March, 1928, and March 5, 1928, the trustees delivered the corpus to the respondent as remainderman. Some of the property was part of the original trust *res,* some was purchased by the trustees both before and after March 1, 1913. In 1930 (February, May 6, and in June), the respondent sold some of the property in each group.

Reversing the Board of Tax Appeals and the Circuit Court of Appeals, Second Circuit, the Supreme Court in an opinion by MR. JUSTICE DOUGLAS decides the questions of controlling values on the authority of the *Maguire case.*

In addition, there was presented a question as to whether the property sold in February, 1930, had been held less than two years, and was, therefore, not a capital asset under Section 101 (c) of the Act of 1928, while that sold on May 6, and in June, 1930, had been held by the respondent for more than two years, and was, therefore, a capital asset.

On this question, the Court holds that the period of the respondent's holding dates from the death of the decedent in respect of property which she owned and from the date of the purchase of the property which the trustees purchased.

The case was argued by Mr. Attorney General Jackson and Miss Helen R. Carloss for petitioner and by Mr. Allin H. Pierce for respondent.

*Helvering v. Campbell, Helvering v. Knox* and *Helvering v. Rogers,* 85 Adv. Op. 684; 61 Sup. Ct. Rep. 798, U. S. Law Week, 4259. (Nos. 473, 474 and 475, decided March 31, 1941).

The principal question here involved, aside from questions also raised in the *Maguire and Gambrill cases* (Nos. 346 and 472), was the status of personalty (shares of stock) which had been exchanged on stock split-ups so that the shares when sold could not be identified in relation to the shares originally acquired from time to time and subsequently split-up.

Of the shares exchanged on the split-up some had been held by the taxpayer's father who died in 1915, some was acquired by the executors of the father's will, some by testamentary trustees under his will. The respondent in question purchased 1000 shares during 1926 and 1927 and she received 15,000 from the testamentary trustees in 1928 when the corpus of the trust was delivered to her. She surrendered these 16,000 shares in 1929 and received 40,000 on a split-up. In 1933 she sold 10,000 shares of those received in 1929.

The Circuit Court held under the "first-in-first-out" rule that the shares respondent purchased are to be deemed the first acquired rather than the shares received from the trustees. This view the Supreme Court rejects as erroneous, in an opinion by MR. JUSTICE DOUGLAS, and rules that the holding by the trustees is included in that of the beneficiary, and that the date of acquisition by the latter was the date of the decedent's death and hence it is the latter date that governs the application of the "first-in-first-out" rule.

In all three cases the CHIEF JUSTICE and MR. JUSTICE ROBERTS were of the view that the cases should be disposed of by affirmance or reversal consistently with the opinion of the Circuit Court of Appeals of the Second Circuit in *Commissioner v. Gambrill,* 112 F.(2d) 530.

The cases were argued by Miss Helen R. Carloss for petitioner and by Mr. Ralph M. Andrews for respondents.

DIVERSITIES
OF THE LAW

III


CARTOON BY "SPY"
*From Vanity Fair*
*London—Oct. 4, 1900*

# PATENTS AND NATIONAL DEFENSE*

By KARL FENNING

Professor of Patent Law, Georgetown University Law School[1]

ONE indication of the importance of patents and inventions in the defense program can be gleaned from the fact that as a result of the World War activities scores of suits for patent infringement were brought against the Government, the total amounts claimed being several hundred million dollars. Prior to 1910 the Government could not be sued for an ordinary infringement of patent. The patentee had to obtain what relief he could against the manufacturer who made and sold to the Government. The Act of June 25, 1910 (35 U.S.C. 68) allowed a suit to be filed in the Court of Claims against the Government to recover for the Government's use of a patented invention. Of course no injunction could be granted against the Government's use of the invention. The courts, however, held that this statute did not free a Government contractor and a suit would be brought against the Government contractor and often an injunction issued prohibiting him from furnishing to the Government goods which infringed a patent. The inconvenience and danger to the Government in this situation was perceived and July 1, 1918, as a part of a Navy appropriation bill (40 Stat. L. 705), the Act of 1910 was amended so that in effect it requires the owner of a patent to sue the Government in the Court of Claims for his entire compensation. This Act has been held to free contractors from liability in furnishing goods to the Government and since this Act was passed the Government contractor cannot be enjoined. These Acts are permanent parts of the law and not war measures. Thus it is possible for the Government at the present time to do anything it wishes and procure anything it wishes for the defense program without being stopped by a patent.

Airplanes are taking a very permanent and important part in the defense program. At the time of the world war the airplane industry had not made very great advances although there were a number of different manufacturing companies. At that time many different parties had patents relating to different parts of the airplane and it was substantially impossible for an adequate airplane to be built without infringing various patents of different parties. In order to smooth out the difficulties which it was seen would arise from this situation the Government aided the various members of the Airplane industry to form the Manufacturers Aircraft Association. This organization furnishes cross-licenses to its members so that a purchase from one of them frees the Government from infringement of all their cross-licensed patents. While this combination has been investigated several times to see if it is against the anti-trust laws it seems to be thought that it is probably necessary for the National defense that such a cross-licensing arrangement continue.

The kind of national defense which is being arranged at the present time is very closely analogous to activities which would take place if we were at war. It is not surprising, therefore, to find that during the present session of Congress there was passed a bill providing for secrecy of inventions which is very similar to a law passed during the world war. The present law, known as Public No. 700 (35 U.S.C. 42), was approved by the President July 1, 1940.[2]

Substantially the same provision was contained in the Act of October 6, 1917 although that law was limited to "during the time that the United States is at war" and did not contain the proviso which is in italics. Substantially the same provision was also contained in the Trading with the Enemy Act of 1917 (Sec. 10[i] 40 Stat. L. 411) which also imposed a money penalty for failure to comply with the order. There the authority to issue the secrecy order was given to the President, who in turn delegated his authority to the Federal Trade Commission.

The effect of the present law is to provide that when a patent application contains matter the publication or disclosure of which would be detrimental to the public safety or defense an order may be issued to keep the matter secret and failure to do so may forfeit the rights to the application. The bill provides that such an invention may be tendered to the Government and the patentee, when the patent finally issues, may sue

*Condensed from a talk before the Pittsburgh Patent Law Association. Oct. 1940.

1. Former Assistant Commissioner of Patents and former Special Assistant to the Attorney General.

2. It reads as follows:

Whenever the publication or disclosure of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the Public safety or defense he may order that the invention be kept secret and withhold the grant of a patent for such period or periods as in his opinion the national interest requires: Provided, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner that in violation of said order said invention has been published or disclosed or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government: *Provided, That the Secretary of War or the Secretary of the Navy or the chief officer of any established defense agency of the United States, as the case may be, is authorized to enter into an agreement with the said applicant in full settlement and compromise for the damage accruing to him by reason of the order of secrecy, and for the use of the invention by the Government.*

Sec. 2 This Act shall take effect on approval and shall remain in force for a period of two years from such date.

the Government in the Court of Claims for the use the Government may have made of the invention before the patent issued. There is an additional provision which was not in the 1917 Act that instead of relegating the patentee to sue to the Court of Claims the Secretary of War or the Secretary of the Navy or chief officer of any established defense agency may enter into an agreement with the applicant for compensation.

It is interesting to note that during the world war the corresponding provision for secrecy was in effect for something less than two years. During that period the Patent Office issued about twenty-one hundred secrecy orders, about half of which were in cases which had been allowed and were merely awaiting payment of the final fee. (See annual reports of Commissioner of Patents for 1917 and 1918.) The Federal Trade Commission and the Patent Office cooperated so that in substantially all cases secrecy orders were issued to both organizations.

In 1917 the army and navy, it is understood, were given substantially free access to the records and files of the Patent Office and the officers of the armed forces examined applications and suggested secrecy orders which were granted substantially as a matter of course.

The procedure under the present statute is materially different. The Commissioner of Patents has appointed a special committee of Patent Office employees to have jurisdiction of the secrecy proceedings. It is understood that this Committee has substantially complete control of the secrecy orders which are now being issued by the Patent Office.

When the Act went into effect the principal examiners in the Patent Office examined as rapidly as possible all of their pending applications, of which there were probably a hundred thousand, beginning first with allowed cases.

To aid in the work the War Department has appointed a special Committee which has delegated much of the actual work to a patent lawyer who is a reserve officer in the Army, now on active duty. The Navy Department also has a special committee headed by a civilian having to do with patents in the office of the Judge Advocate General.

When the investigation by the committees in the War Department or Navy Department indicates probable defense importance of an application a report is made and it is referred back to the Patent Office with a recommendation that a secrecy order issue. As a matter of detail the official papers of the application always remain in the Patent Office and they are examined in the Patent Office by the Army and Navy Committees and by such experts as may be called in by these committees or by the Patent Office committee. The Patent Office committee does not rely entirely on the War and Navy Departments nor on its own opinion nor on that of its examiners but does not hesitate to call in outside experts, especially from other Government Departments.

The purpose of the procedure is to keep matters secret which should not be disclosed. It is, of course, important to determine prima facie at least, whether the matter in the application is new or is already known to the public through other sources. Obviously if the application contains nothing new there is no advantage or purpose in putting a secrecy order on it. To this end an examiner who submits a case to the Secrecy Committee of the Patent Office not infrequently is requested to make an unofficial search to determine whether there is anything new and secret in the application. This examination of the application, of course, is not limited to the claims. The purpose of the 1940 statute is to keep disclosure secret. Therefore the Patent Office committee constantly keeps in mind the entire showing of the application. It may be that the specific thing claimed may be innocuous and so not warranting a secrecy order, but the general disclosure in the application of the surroundings for the invention may be such as to justify secrecy and in such instances a secrecy order may be issued.

Substantially the same procedure is adopted with new applications as they are filed in the Patent Office. They are examined by the examiner as soon as possible and those which seem to be of sufficient importance to defense to justify secrecy orders are reported to the Patent Office committee and subsequently assigned to the War or Navy Department, which generally appoints an appropriate sub-committee to investigate and report.

Of course there are a great many applications in the Patent Office relating to inventions owned by the Government itself. Ordinarily the Patent Office secrecy orders are not issued in these cases because the Army and Navy seem to have adequate facilities for keeping the inventions secret and the three year prosecution rule in Government cases, provided for by 35 U.S.C. 47, provides sufficient delay in publication of the patent itself.

The effect of a secrecy order may result in an allowed application being withheld from issue even after the final fee is paid; it may prevent disclosure of applications to interfering parties and so prevent decision of interferences; it will prevent filing foreign applications and it will prevent publication of descriptions in newspapers, trade journals, etc., as well as papers before technical societies. Neither the inventor nor his attorney should talk generally to others about the invention.

If the applicant desires to suggest his invention to the Government or to some organization which is under contract with the Government or if he wishes to file foreign applications he should petition the Commissioner of Patents and obtain a release for that specific purpose. It is understood that the Patent Office is lenient with such permission when it seems reasonable although it is entirely conceivable that the Patent Office might refuse to give an applicant permission to peddle his invention generally to endeavor to get someone interested in it.

The Patent Office is endeavoring to be more careful in limiting the number of secrecy orders at the present time than was done under the war conditions of 1917

and 1918. So far a very small number of secrecy orders have been issued, the total probably being only a few hundred. One reason for this hesitancy in issuing secrecy orders is so as not to unduly limit the inventor in the advertisement and development of his invention. Another matter in mind seems to be the endeavor to avoid the suggestion that the Government thinks the invention worth while and may pay for it—a suspicion which may be aroused by the final sentence of the secrecy order suggesting that the applicant suggest the invention to the Army or Navy.

There has been no official publication of orders or decisions with respect to this secrecy rule. Nor were there any published Patent Office decisions relating to the secrecy law during the world war. Some understanding, however, of the effect of the law may be obtained from decisions of the Court of Claims. About a half dozen cases decided by that Court have interpreted one or another phase of the 1917 Secrecy Act. The matter, of course, was brought before the Court of Claims when the patentee in whose application a secrecy order was issued sued the Government for compensation for use of the invention.[3]

It is, of course, well known that suggestions of inventions which may be of use to the national defense are constantly being offered to the Government. These go to and are considered by the Army and Navy generally. The reports of the Commissioner of Patents indicate that during the world war the Patent Office received and considered about two thousand ideas, sketches, etc., which were not involved in applications for patent and that about two hundred of these were forwarded by the Patent Office to the various departments as probably worth while. In order to take care of this situation during the present defense activities the Secretary of Commerce, with the concurrence of the President, has created the National Inventor's Council. The Council is made up of several inventors, manufacturers, etc., who have had considerable experience with developing new ideas. The council, through its examining division proposes to receive, and serve as a clearing house for, suggestions or inventions from civilians relating to the national defense. It will consider matters whether involving applications for patent or not. Suggestions are coming before it at the rate of about one hundred a day, many of course being duplicates. It is understood that suggestions sent to the Army and Navy will not be investigated by them but will be referred to this Council for consideration.

In order to protect his interests an inventor of anything having to do with defense should file his application for patent as soon as possible and attempt to get a secrecy order issued so as to have compensation despite delays. He may thereafter tender the invention to the Government and negotiate for compensation or later, after the patent issues, sue in the Court of Claims for compensation. After his application is filed in the Patent Office he should write a letter to the Commissioner of Patents or the Patent Office Defense Committee identifying his application and stating what facts he can to show that it is important for defense and specifically request a secrecy order under the statute.

There is a National Defense Research Board whose purpose is to coordinate and use the research facilities of the country such as laboratories, testing plants, etc., to obtain facilities and personnel to work on research problems which may be needed for defense.

Section 6 of the Act of July 2, 1940 (50 U.S.C. 99) authorizes the President in the interests of national defense, "to prohibit or curtail the exportation of military equipment, munitions or component parts thereof, or machinery, tools or materials or supplies necessary for the servicing or operation thereof," by proclamation. On its face this Act seems to relate to physical articles which may not be exported without permit. The President's second proclamation under the Act, dated September 12, 1940 (519 O.G. 217; F.R. Doc. 40-3860), relates to motor fuel and also prohibits the exportation of "plans, specifications or other documents containing descriptive or technical information of any kind (other than that appearing in any form available to the general public) setting forth the design, or construction of aircraft or aircraft engines." This proclamation seems to be broad enough in its terms to include the specification and drawings of a patent application so that apparently if the information is not otherwise available to the general public the sending abroad of an application for patent relating to aircraft or aircraft engines may be an infringement of this proclamation. Of course the filing of a foreign application is inhibited by the secrecy order under the Act of July 1, 1940, but this proclamation seems to prohibit foreign applications in cases in which there is no secrecy order. There is no general inhibition against applications for foreign patents. Anyone who has any doubt as to the propriety of any specific foreign application may refer it to the Administrator of Export Control. (See President's proclamation of March 4, 1941, F.R. Doc. 41-1625, relating to plans, technical information, etc., relating to national defense. Other proclamations may be expected.)

The defense activities involving enlargement of the

3. The principal cases are:
*Zeidler v. U. S.* (1926), 61 Ct. Cls. 537 where it was found secrecy was not observed.
*Rodman Chemical Co. v. U. S.* (1928), 65 Ct. Cls. 41, holding secrecy order was within the discretion of the Commissioner.
*Allgrunn v. U. S.* (1928), 67 Ct. Cls. 1, as to awards from the federal Government for the invention.
*Ordnance Engineering Corp. v. U. S.* (1929), 68 Ct. Cls. 301 saying: "The statute clearly contemplated a real tender—i.e. the bringing to the attention of the Government the essential facts with reference to the invention so that subsequent use of the invention may prevail with knowledge of liability for the use."
In a subsequent suit, *Ordnance Engineering Corp. v. U. S.* (1931), 73 Ct. Cls. 379; 11 USPQ 291, the plaintiff recovered for Government infringement subsequent to the issue of the patent.
*Gathmann v. U. S.* (1931), 71 Ct. Cls. 680; 9 USPQ 83 concerning infringement by the Government.
*Barlow v U. S.* (1936), 82 Ct. Cls. 360; 28 USPQ 499, concerning Government infringement under the 1917 Secrecy Act.
*Martin v. U. S.* (1937), 84 Ct. Cls. 41; 32 USPQ 35, holding rights did not carry over to a renewal application.

army may also affect inventors. The Draft Act and especially the Soldiers and Sailors Civil Relief Act approved October 17, 1940, provides for stays of court action or stay of execution or judgment involving persons in the military service. When the inventor is called for military service infringement suits and suits under R.S. 4915 or R.S. 4918 may be affected.

The Secrecy Act of July 1, 1940 by its terms remains in force for a period of two years. The Act gives the right to sue in the Court of Claims. It may be that if that suit is not brought before July 1, 1942 the Court of Claims will say it has no jurisdiction.

A bill (HR 3359) now pending in Congress proposes to amend the Act of July 1, 1940 by providing, among other things, that no application for a foreign patent may be filed for any invention without specific permission of the Commissioner of Patents. HR 3360 similarly prohibits injunctions on patents relating to national defense and the Department of Justice has proposed an amendment allowing the President to seize any patent and grant licenses under it.

While the effect of inventions on defense activities is recognized to be great it seems clear that the inventor should be careful to take the proper steps to protect his rights.

## Federal Probation

The January-March issue of the quarterly journal published under the above name is just at hand. It is published by the Administrative OFFICE OF THE UNITED STATES COURTS, in cooperation with the BUREAU OF PRISONS of the DEPARTMENT OF JUSTICE. The magazine which is now in its fifth year carries the sub-title *"A Quarterly Journal of Correctional Philosophy and Practice."* This issue which runs to about 60 pages, is chiefly devoted to "The Indeterminate Sentence."

Leading articles are by Judge William C. Coleman, of the United States District Court for the District of Maryland, Judge Gunnar H. Nordbye of the United States District Court for the District of Minnesota, and Judge Justin Miller, of the United States Court of Appeals for the District of Columbia. In addition there are articles by Alexander Holtzoff, Special Assistant to the Attorney General, Sheldon Glueck, Professor of Criminology, Harvard Law School, and Thorsten Sellin, Professor of Sociology, University of Pennsylvania.

The magazine announces that "proposals are currently under way to introduce the indeterminate sentence plan as a part of the criminal procedure of the Federal Courts." For this reason the discussions on that topic are particularly timely, and will be read by a large part of the practicing profession with much interest.

## The Havana Meeting

[*The Journal asked President Jacob M. Lashly to write a short editorial note on the recent meeting of the Inter-American Bar Association in Havana. We are glad to present the following comment from so high an authority on the significance of that important meeting.—Ed.*]

The Section of International and Comparative Law deserves congratulation and the commendation of the bar of the country upon the vision which prompted it to initiate the organization of an Inter-American Bar Association whose historic Conference was held at Havana last month.

The effects of the Conference are not susceptible of precise admeasurement, nor will all of the evidence be in upon the point for a long time, perhaps never. Delegates selected from among the members of the bench and bar of 16 of the 21 republics in the Western hemisphere fraternized with each other and studied together for a period of four intense and crowded days. Consequences of significance would be expected from this fact alone, in ordinary circumstances. But the conditions in which these exchanges were made were not ordinary. They were exceptional in a number of respects. For example, the countries represented by these delegates were disturbed, each in its own especial way, by the world-shaking events of the greatest war of all, which might but had not yet, spread to the Western hemisphere; many of the problems of defense were common to them; adequate national defense in most instances raised serious political questions—changes in government and laws; some of these changes would involve fundamental breaks with traditional concepts and procedures; the lawyers who were meeting in the Conference were important persons in their respective countries, whose legal training would give them great influence in regard to proposed changes in government or laws.

The combination of these circumstances makes it certain that the interchange of views in the atmosphere of friendliness furnished by the Conference would be helpful to all. It seems that such a Conference was long overdue and probably would not have been held at all except as a psychological bi-product of the Axis menace. It would be particularly unfortunate should the next Conference be unduly delayed until the memories and fellowships of the first one shall have been permitted to grow dim through the lapse of time.

# JUNIOR BAR NOTES

By JAMES P. ECONOMOS

Secretary of the Junior Bar Conference

### Indianapolis Meeting

Plans for the annual meeting of the Junior Bar Conference in Indianapolis, September 28, 1941 are being worked out. James A. Gleason, of Cleveland, has been placed in charge of the program and will be assisted by Frederick A. Ballard, Washington, D.C., Julius Birge, of Indianapolis, and Willett N. Gorham, of Chicago. Harold H. Bredell, Indianapolis, Indiana, was appointed Chairman of the Arrangements Committee.

### Regional Meetings

Chairman Lewis Powell, Jr. of Richmond, Va. was the principal speaker April 7, 1941 at the regional meeting of Junior Bar executives held in that city. State Chairmen and State and Local Directors of Public Information representing the States of Virginia, South Carolina, North Carolina, Pennsylvania, New Jersey, Delaware, Maryland, and West Virginia participated in the meeting. President Lashly also addressed the meeting.

Memphis, Tennessee, was the focal point for the Junior Bar workers of Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Arkansas, Louisiana, and Texas on April 3rd. Vice Chairman Philip H. Lewis, Topeka, Kansas, officially represented the Conference. The wisdom of holding regional meetings is best illustrated by action taken at the Denver regional meeting. It was instrumental in the formation of a voluntary exchange of written reports of activities every two months between state Junior Bar conferences. The members present report that the meeting was invaluable and it was their recommendation that the practice of holding regional meetings should be a regular part of any program sponsored by the Conference.

Law Bulletin Photo

Junior Bar Conference Council, Mid-winter meeting, March 16, 1941, Edgewater Beach Hotel, Chicago.

Left to right: Joseph D. Calhoun, Media, Pa.; H. Graham Morison, New York; James A. Gleason, Cleveland; Ben Scott Whaley, Charleston, S. C.; James Fellers, Oklahoma City; Philip L. Lewis, Topeka, vice chairman; Lewis F. Powell, Jr., Richmond, Va., chairman; James P. Economos, Chicago, secretary; John W. Oliver, Kansas City, Mo.; Harold Schweitzer, Los Angeles; William B. Carssow, Austin, Texas; Paul F. Hannah, Washington, D. C.; and Leslie P. Hemry, Jr., Boston. Members of the Council not present when picture was taken are Willett N. Gorham, Chicago, and Frederick A. Ballard, Washington, D. C.

Detroit, Kansas City and Minneapolis are the cities selected for the remaining regional meetings of the current association year. The meeting in Detroit is scheduled for May 19 and two days later the Junior Bar executives will meet in Minneapolis.

### Clearing-House for Bar Activities

The official family of the Conference has concerned itself with the proper place of the Conference in national, state and local Bar Association fields. A strong national organization of the bar in this respect is both necessary and desirable. Such an organization can be achieved only through complete cooperation with all state and local associations. If the national organization makes a bona fide contribution to effective bar association activity, credit should be given to it by the state and local associations and vice versa.

### Public Information Program

National Director Paul F. Hannah, Washington, D. C., reports that both the public and the local public information directors have shown great interest in the March program designated "Can American Democracy Solve the Defense Production Problem." It has been extended for at least another month.

Neil C. McMullen, State Director for Florida, has arranged an unusual speaking campaign on subjects pertaining to citizenship and its responsibilities in the Florida schools. He expects that approximately four hundred speeches will have been made before the end of the present school year.

### Procedural Reform Studies

Reports, from several states, on "Rule Making Powers" have been published in the Iowa Law Review, Kansas Bar Journal, Missouri State Bar Journal, Oregon Law Review, South Dakota Bar Journal, Texas Bar Journal, West Virginia Law Quarterly, and Connecticut Bar Journal.

Chairman Lewis Powell, Jr. has appointed the following new State Procedural Reform Survey Directors:

Miss Louisa Wilson, Washington, D. C., Lee Metcalf, Helena, Montana, Fenelon Boesche, Tulsa, Oklahoma, and Orville N. Foreman, Jacksonville, Illinois.

### Local Items

The Oregon State Bar (integrated) authorized the formation of a Junior Bar Committee and has called Thomas J. White, Portland, to serve as its first chairman. The Conference is gratified to know that its State Chairman for Oregon was selected for this important post. The primary activity of this committee will be to promote the Public Information Program throughout the entire state.

State Chairman Francis P. Linneman, Chicago, spoke on behalf of the Conference at a luncheon in honor of newly admitted lawyers sponsored by the Illinois State Bar Association through its Younger Members Section, and held on April 10, 1941 in Springfield, Illinois. These luncheons were inaugurated in 1921 and have been held continuously since that time.

The Junior Bar Conference will be represented at the Arizona State Bar Association Convention to be held in Phoenix by Whitney Harris, Los Angeles, California. He will speak on the work of the Conference and also participate in a round table discussion with junior bar members at the meeting. State Chairman Philip Munch, Phoenix, expects a large attendance.

John A. Johnson, Oklahoma City, Oklahoma director of the Personal Finance Surveys, reports that on April 4, 1941, Governor Leon C. Phillips signed the Oklahoma Small Loan Act of 1941. Many attribute the work accomplished by Mr. Johnson and his assistants in this survey as being particularly useful to the Governor in correcting the abuses existing in this field. Mr. Johnson was invited to appear before the Legislative Committee investigating this subject in order to give them the benefits of his experiences derived from the survey.

Lawrence Dumas, Birmingham, Alabama, reports that the Mississippi Junior Bar is again undertaking to make surveys in the different towns of the state and then advising law students of places where they think openings exist. It is believed that this is an excellent activity for any junior bar group.

The Colorado Junior Bar Conference held its semi-annual dinner for newly admitted members of the bar on March 12 in Denver, Colorado, immediately following the admission ceremonies. Chief Justice Bouck of Colorado Supreme Court, Professor Gordon Johnson of the Denver University Law School and Benjamin E. Sweet, President of the Denver Bar Association, spoke of the problems confronting the newly admitted lawyer. John W. O'Hagan, president of the Colorado Junior Bar Conference presided.

National Membership Chairman Willett N. Gorham and the officers of the Conference are disappointed in the response to the "Member get a Member" request sent out with the roster. It is suggested that in contacting prospective members at this time, it be emphasized that applications filed now, with a full year's dues attached, will be put through immediately for election, thereby giving the applicants the benefits of membership during the remainder of the present fiscal year, which ends June 30th, without additional cost to them.

## STATUTE DRAFTSMAN'S MANUAL

[*In Minnesota, as in a few other states, there has been created the office of "Revisor of Statutes." The 1941 Report of that office, a pamphlet of 70 pages, contains much information of value to draftsmen, whether of Statutes or of other formal instruments. Among other things is found a* "Manual" *on statutory drafting. The head note states that it is based on the well-known work of Lord Thring, and that the Legislative Reference Bureaus in Wisconsin, Kentucky and elsewhere have assisted in its preparation. From it we clip the following item.—Ed.*]

### Revision Procedure

(1) "Search the index for all sections dealing with the subject to be revised.

(2) Read the construction chapter before and after revising each chapter.

(3) Study the annotations before commencing to revise.

(4) Prepare a skeleton classification of the subject matter before beginning revision.

(5) The revisor should first get the whole subject into his head, separating the important points and trusting to his memory to retain them; then group his facts according to their importance. When he has thus arranged the outline of the composition he may fill in the details.

(6) He should acquaint himself with the material assigned to the chapter; arrange it in logical order; inquire whether it is so homogeneous that the chapter title constitutes a sufficient designation of the material; and place the sections in proper order and sequence.

(7) Relative terms should be collected and listed for use.

(8) The rewritten law must be examined and re-examined, laid aside and then gone over with a fresh view. The revisor should draft a revision bill at least twice.

(9) Check the reference list for each section revised in order to correlate the section in which the reference is made.

(10) Check statutes to be repealed to make sure that all references are correct.

(11) Check every section headnote to see if it is clear and sufficient.

(12) If revisor A needs material found in a section that is part of a chapter being worked over by revisor B, and if after the withdrawal of the"

*(Continued on page 326)*

# WASHINGTON LETTER

WITH government encouragement, the tooling-up of industry for war production has proceeded more rapidly than most of us appreciate. Quietly and without much front-paging, both the Army and the Navy are progressing rapidly toward all the mechanization which their various services can use effectively. Every branch of mechanical industry has re-tooled wherever necessary to expedite this program; and some manufacturers have been agreeably surprised at the smallness of the changes required in order to take on a substantial amount of war work, often without upsetting their regular schedules.

Under Secretary of War Robert P. Patterson recently told a Senate committee that "We had to take industrial America as we found it. For steel we went to the established steel mills. For automobiles we went to Detroit. So does the general public."

Referring to armament advances which we have made, Mr. Patterson continued: "Our light and medium tanks are superior in speed, armor and weapons to those of any other army. The Army is well on the way to complete motorization. The combat airplanes now being delivered, bombers and pursuits, are of advanced designs incorporating the meritorious features developed from the European war. We believe them to be superior to the planes being used in the war today.

"There has been no hesitation on the part of the Army as to types of weapons and of equipment to be ordered. Basic decisions have been resolutely made. Our money has been put to work fast."

### Taxing on a Wider Base

The process of getting more money to put to work for national defense, and to pay the hire on other money borrowed, is becoming of growing concern to official Washington. It has become evident that taxes on incomes must begin to strike down into the lower brackets. Senator Edwin C. Johnson, of Colorado, suggests that present exemptions, of $2,000 for married persons and $800 for those who are single, be eliminated entirely. He is quoted as having said, upon returning to Washington from the West, that he has "never seen people more willing to be taxed than they are at present and we ought to appreciate their attitude and be guided by it." In addition to lowering or eliminating the exemptions to taxes on small incomes, it is quite evident that a substantial increase in revenue will be sought from raising tax rates on incomes in the several classes from $3,000 to $20,000. However, some increase of rates in the higher brackets will not be overlooked. Corporation tax rates will be increased; and new sales taxes will be levied, although probably, as now, under the more palatable name of excise taxes. And higher rates on liquor are forecast.

With the debt limit lately increased to 65 billion dollars, which figure it is anticipated soon will be raised again, it is planned to increase present federal tax yields to more than 10 billions annually or by at least one and one-half billions over the present yield of slightly under 9 billions. Hence, while the blessing of direct taxes moves downward into the substrata to find for itself a broader base, the rates and the productivity of the entire tax mechanism move to new heights, the sole question being the exact route which they may take; and it generally is conceded they will take the only highly productive route, the one above indicated.

### Solving Labor Problems

The good results accomplished by the National Defense Mediation Board in its brief existence to date, together with other progressive measures in view for the near future, inspire hope for an effective solution of the nation's major labor difficulties. A notable step in the direction of industrial "peace" was the recent rise of ten cents per hour in wages of workers in the steel industry, which was effected without a major strike.

The Vinson bill, H. R. 4139, so-called after Representative Carl Vinson, of Georgia, Chairman of the House Naval Affairs Committee, would provide a statutory method of procedure for the National Defense Mediation Board in respect to work in the plants of naval contractors. When a dispute there arises between the contractor and its employees, either would give notice to the other, under the Board's regulations, setting forth their contentions, claims, and demands. If unable to agree, they may invoke the services of present federal and state conciliation agencies. The bill has strong support and at the same time strong opposition.

Should an agreement not be reached in ten days, the bill provides that a notice by either party may be given the Mediation Board of an intention to strike or establish a lockout, such action to be taken only after the Board shall have rendered its report; and, without the giving of such notice, a strike or lockout would be illegal. The parties would be obliged to attend conferences before the Board until excused but not for more than twenty days after the giving of the notice unless by the consent of both sides. The Board would be required to report within twenty days, its report to be published in the Federal Register.

An adverse change in pay, hours, or other conditions of labor made by the naval contractor, without written consent of his employees or their representatives, would be unlawful except upon twenty days notice of such changes, or after the Board has made its report. But, if the method of arbitration is accepted by both parties, the Board will appoint three arbitrators, one for the public, one for the workers, and one for the employer. A reservoir of such mediators would be created by presidential appointment of thirty-six members to a Naval Defense Adjustment Board consisting of eighteen nominated by

naval contractors and eighteen by national labor organizations. Hearings would be held before two or more members but final awards would be made only by a majority vote in the Division of the Adjustment Board to which the case was assigned.

It would be unlawful for a naval contractor, through discrimination, either to encourage or discourage membership in a labor organization, except as required by a contract entered before the enactment of this Vinson bill, which conforms to Sec. 8 (3) of the Labor Relations Act. Another provision would prevent a naval contractor from knowingly hiring or retaining in his employ a person who, as he had reasonable cause to believe, had engaged in subversive activities such as advocating overthrow of the government by force, being a member of the Communist party, the German-American Bund, etc.

**Further Expediting Defense**

Another bill by Representative Vinson, H. R. 4257, would supplement authority already granted the President to conscript industry in behalf of defense production. The authority, which has been in effect since September 16, 1940, is the statutory requirement for compliance with orders for materials placed through the heads of the War and Navy Departments; to give priority to such orders; and to produce such defense materials on reasonable terms, or else have the Government take immediate possession of the plants. The new power proposed by Mr. Vinson would permit a similar taking over in case of an existing or threatened failure of production in any industrial plant equipped to manufacture defense materials. Upon examination, if the Secretary of War or the Secretary of the Navy should find such condition to exist and should so recommend, the President might take over the plant and operate it for the Government, either with the Government's employees or otherwise.

National defense would be promoted by Senator Robert R. Reynolds, of the Military Affairs Committee, through S. J. Res. 64, making it unlawful for a labor organization, purporting to represent persons employed in interstate or foreign commerce or in producing goods for such trade or for national defense, to have any officer or agent who is not a citizen of the United States, who is a Communist, a Fascist, or a member of any Nazi bund organization, or who has within the past two years been identified with such an organization, or who has forfeited his United States citizenship through conviction of a felony. Unions would be required to use due diligence to determine whether their officers or agents come under such ban; and penalty for violation would be a fine of not more than $10,000, each violation being considered a separate offense.

**Conscientious Objectors' Appeals**

There are three stages in the determination of what shall be done, under the Selective Training and Service Act, with persons claiming exemption from "combatant training and service" because, "by reason of religious training and belief," they are "conscientiously opposed to participation in war in any form," to speak in the phraseology of the statute. [Title 50 U. S. C. A. Sec. 305 (g).] The first stage has to do with the presentation of the claim for exemption before, and action upon it by, the Civilian Local Board. The second stage has to do with proceedings before the Agency of the Department of Justice provided for in the statute, in the same section and subdivision as above noted. The third stage concerns proceedings before the Civilian Appeal Board, provided by Sec. 310 (a) (2) of the above title.

This story is, chiefly, in respect to the second stage because the procedure therein has just been determined by the Department of Justice. While this is called the second stage here for convenience, nevertheless, there is no appeal to this Agency of the Department. The method of getting before it, as the statute provides, is that, upon appeal from the local board, "the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof." It is provided that, after appropriate inquiry, such agency, after notice of the time and place to the person involved, shall hold a hearing "with respect to the character and good faith of the objections of the person concerned." This Agency then makes recommendations to the Appeal Board, which it must consider but which it "shall not be bound to follow." If the Agency finds the objections are not sustained it must so recommend. If it finds the objections are sustained, it must recommend either that the objector, if inducted into the service, "be assigned to noncombatant service"; or if he is "found to be conscientiously opposed to participation in such noncombatant service" that he "be assigned to work of national importance under civilian direction."

In establishing the statutory Agency, the Attorney General has appointed Hearing Officers and the plan is eventually to have at least one for each federal judicial district. It was stated that the Department has endeavored "to appoint only men recognized in their communities for patience, tolerance and well-balanced judgment." At the latest report, ten of these Hearing Officers had been appointed. A number of those selected have been members of the American Bar Association for many years. The list, so far, is: Northern and Western Districts of New York, William Palmer, Buffalo, a member of the A. B. A. since 1927; Southern and Eastern Districts of New York, Lamar Hardy, New York City, A. B. A. since 1931; District of Columbia, E. Barrett Prettyman, Washington, A. B. A. since 1925; District of Minnesota, A. E. Giddings, Anoka; Western District of Tennessee, Walter P. Armstrong, Memphis, A. B. A. since 1914; Eastern District of Missouri, Frank A. Thompson, St. Louis, A. B. A. since 1920; Northern District of Ohio, Stanley L. Orr, Cleveland; Western District of Oklahoma, Richard A. Billups, Oklahoma City; Mid-

dle District of Tennessee, Frank A. Berry, Nashville, A. B. A. since 1916; and District of Kansas, Charles G. Yankey, Wichita.

The United States Attorneys are a part of the Agency used in this connection by the Department of Justice. To them the Appeal Boards will refer all cases in their particular judicial districts. The United States Attorney will transmit the file for inquiry to the nearest field office of the FBI. After their investigation, the case will be transmitted, through the United States Attorney to the proper Hearing Officer who, if the investigation seems sufficient, will set the hearing as above indicated, but after at least ten days notice to the registrant. An effort will be made to arrange the hearings with the least expense to the Government and without undue inconvenience to the registrant.

The hearing will not be in the nature of a trial or judicial proceeding but will be informal and nonlegalistic without regard to ordinary rules of evidence. In view of its nature and object, the hearing sometimes may be private. The effort will be so to conduct it that the rights of the registrant, on the one hand, and the rights of his country and fellow citizens, on the other, are recognized and protected. If a Hearing Officer is not satisfied that all pertinent facts have been disclosed, he may, upon so advising the registrant, adjourn the hearing to a definite future date; and then request the Federal Bureau of Investigation to make further inquiry into the specific matters concerning which he is not satisfied.

The purpose of the hearing will be to aid in determining the character and good faith of the objections of the person claiming exemption. The Hearing Officer will endeavor to form a fair but definite opinion of the sincerity of the registrant's alleged convictions and beliefs and the consistency of his daily life with those beliefs. The Department has pointed out that conscientious objectors may be divided into two types: "(a) Those whose conscientious objections are based upon the tenets of a particular church or religious organization, and (b) Those whose conscientious objections are based upon their own scruples but who do not rely upon adherence to a particular religious doctrine or membership in any church, sect, or religious organization as a basis thereof." The latter class of cases are recognized as more difficult and it is noted, especially in reference to them, that the question is whether the registrant individually is conscientiously opposed to participation in war in general and not merely in a particular war. In seeking to determine the state of mind of the objector, the Hearing Officer must satisfy himself that the objections of the registrant are based upon a personal religious or ethical conviction and not upon a political doctrine.

Following the conclusion of the hearing, the Hearing Officer will prepare and forward to the Department (1) a statement of findings of fact based upon a consideration of the entire file and record and all the evidence adduced and (2) a proposed recommendation for the Department of Justice.

The powers of the Civilian Appeal Boards are not clearly stated in the statute. Title 50 U. S. C. A. Secs. 305 (g) and 310 (a) (2). It might be said, by inference, that they can review and revise all determinations of the Local Boards, being therefore limited in their decisions to such conclusions as the Local Boards may reach. It is provided that the Local Boards shall have power, "subject to the right of appeal to the appeal boards herein authorized" to "hear and determine • • • all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards." Sec. 310 (a) (2). But, under Sec. 305 (g), the only powers of the Local Boards in these respects, if they are satisfied that the registrant really is "conscientiously opposed" etc., by reason of the training and belief specified, are to determine that he shall, if called, "be assigned to noncombatant service"; or, if "conscientiously opposed" to that service, he shall "be assigned to work of national importance under civilian direction." Wherefore it appears that even the Appeal Board may not entirely relieve the objector from service to his country, but may only make adjustments in the type of service which he must render.

### Voluntary Services

The statement has been made recently in Washington that there are in the Office of Production Management 163 dollar-a-year men and 350 persons serving without compensation. This brings to mind that old provision, which has been in the law since 1906 or earlier, saying: "Nor shall any department or any officer of the Government accept voluntary service for the Government • • •." [Title 31 U. S. C. A. Sec. 665.] The Attorney General, in 1913, rendered an opinion to the effect that, where an office was permitted by a specific provision of law to be nonsalaried, this general provision would not cover services rendered in such official capacity. [30 Op. Atty. Gen. 51.]

This matter is taken care of in some of the acts pertaining to those agencies wherein it is customary for persons to serve without compensation. For example, in creating the Council of National Defense, the Act of August 29, 1916 provided that "The members of the advisory commission shall serve without compensation • • •." Title 50 U. S. C. A. Sec. 2. Another instance is where the recent Selective Training and Service Act states that "In the administration of this Act voluntary services may be accepted." [Title 50 U. S. C. A. Sec. 310 (c).] It might be interesting to know whether equal statutory care has been taken in respect to all persons now rendering voluntary services. The Office of Production Management, of course, is not statutory, having been created January 7, 1941, in the Executive Office of the President, by Executive Order No. 8629.

# BOOK REVIEWS

*Government and Economic Life: Development and Current Issues of American Public Policy, Vol. I,* by Leverett S. Lyon, Myron W. Watkins, and Victor Abramson. 1939. Washington, D. C.: The Brookings Institution. Pp. xvi, 519.—Once more the Brookings Institution has given the truth-seeking and knowledge-hungry elements of the people, including college students, a valuable and comprehensive study of governmental policy in the economic field, and of the current trends and issues that cannot be understood without mastery of certain basic principles and historical factors and influences.

The viewpoint of the authors is distinctly but moderately progressive. They point neither with alarm nor with glee to the reform legislation of the past several decades, legislation restrictive of private enterprise, consistent with the British common law and inevitable in a democracy during a period of rapid change and development.

What have we done toward the protection of consumers, small investors, independent business and wage-workers? What is the rationale of our anti-trust laws, our new governmental agencies, our regulation of competition, our monetary and banking measures, our bankruptcy and patent policies? To what extent has the old *laissez-faire* principle been whittled down and for what reasons?

These and similar questions, which so many partisans and theorists have discussed with more passion than reason guided by scientific knowledge, are discussed by the authors in a spirit of sympathy with the general public and fairness to all social strata. Nothing is taken for granted. Controversial proposals and statutes, like the anti-injunction laws, state and federal, or the control of corporate relationships and practices, are interpreted in the light of past and present conditions, technological and cultural.

What was said of another remarkable Brookings study,—namely that no one can consider himself educated who has not read and pondered those volumes,—can also be said of the present elaborate work. It is to be hoped that our colleges and higher technical and professional schools are using it, or will use it, as a text-book and basis of tolerant discussion in seminars and classrooms.

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*Government and Economic Life, Vol. II,* by Leverett S. Lyon, Victor Abramson and Associates. Brookings Institute, Washington, D. C. Pp. XI, 780.—This volume—the second—of the Brookings study of the gradual development and the current issues of American public policy in the economic field differs from the first in that it considers special governmental treatment of "limited areas" of economic life or "limited periods," like crises preceding war or periods of actual military conflicts.

The questions which arise during such periods are particularly difficult, yet legislative action in respect of them is likely to be hasty, superficial, and ill-considered. On the other hand, legislative action within limited areas, such as the sphere of so-called public utilities, is generally very deliberate and cautious. In this area there is no turning back; evolution is steady and in a definite direction. Public control is not likely to be abandoned, and its relative failure may lead to public ownership and operation.

Among the more complex questions discussed in the second volume are these: What plans have we, if any, for readjusting our defense economy to a peace basis? What lessons has our recent experience with high protection taught us? What are we doing, or planning to do, in the field of transportation, where unification is so essential, and where so little has been accomplished toward that objective in two decades? What is permanent in the New Deal, and what transitory? What success is attending our costly agricultural program? What is government competition doing to private enterprise?

In answering these and similar questions, the authors of the volume seem more pessimistic and more anxious than most of our liberals. They feel that we are not getting anywhere with the farm problem, since the subsidies and other payments are mere makeshifts, and the urban taxpayers are footing heavy bills and facing even heavier ones without the assurance that they are promoting the general welfare. In the matter of social insurance, again, the authors are not at all convinced that the principle of universal *compulsory* insurance is really sound. The fact that no country that has adopted this principle has ever thought seriously of reverting to voluntary insurance, is not explained. Our tariff legislation is given a very low grade. One is reminded of John Morley's admission that in politics the choice often lies between two blunders.

Are we just muddling and floundering? What are the alternatives, one is asking while reading the authors' expressions of doubt and misgiving. They say, though, that the time for positive and confident conclusions or recommendations has not yet come. When it does come, Brookings, we may hope, will give us a third volume, and a more cheerful and constructive one, on the problems and developments covered in the present one.

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*The American Empire: A Study of the Outlying Territories of the United States,* edited by William H. Haas. 1940. University of Chicago Press. Pp. xi, 398.—Dollar diplomacy and the policy of imperialistic expansion are things of the past in the United States, and

the good-neighbor policy has undoubtedly made a fairly deep impression on Latin America, though considerable suspicion and distrust survive in some countries. But the many problems accumulated during the period of territorial acquisition and financial conquest and penetration have by no means been solved. Some of them, indeed, are now more troublesome and menacing than ever before, and the glib champions of manifest destiny—if any remain—are perplexed and silent.

What is the future of Puerto Rico, of the Philippines, of the Virgin Islands, even of Hawaii? What are the economic and social conditions of our territories and possessions, and what is our duty toward them? And does true national interest coincide with duty and honor?

There are no dogmatic answers to these questions in the work under notice, but there is plenty of material to enable the intelligent reader to form certain tentative opinions concerning the available solutions of the problems discussed. The six contributors to the volume, all of them experts, in a sense, deal respectively with the situations, conditions, dangers and prospects of Puerto Rico, the Virgin Islands, the Panama Canal Zone, Alaska, Hawaii and the Philippine archipelago.

The American public, as the editor points out, is woefully ignorant of the problems presented by our empire, and should welcome information thereon conveyed in interesting and readable form. The treatment throughout is realistic, impartial, judicious. Mistakes on the part of the government are admitted; difficulties are faced squarely, and mixed motives are candidly recognized. American policy has not been purely idealistic, for example, in pledging independence to the Philippines, or in repealing the Platt Amendment and freeing Cuba, or in renouncing the raw, selfish kind of imperialism. Yet our possessions have been greatly benefitted by our sovereignty over them and by our heavy investments in their industries. The old, doctrinaire anti-annexationists were rather unfair in their sweeping denunciations of the government. The imperialists, on the other hand, talked much nonsense about the "Far East becoming the Near West," and the glory and prosperity that the colonies and remote possessions would bring to the continental United States. But these things are part of the political processes of democracy. The exaggerations, fancies and buncombe are forgotten. The conditions, not the rival theories, confronting us challenge our attention. An educated citizenry may help statesmen, administrators, and industrialists reach reasonable decisions and avoid costly blunders.

—Victor S. Yarros.

Winter Park, Fla.

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*The Strangest Cases On Record,* by John Allison Duncan. Chicago: Reilly & Lee. Pp. 272. [no date]

This is a collection of incidents, anecdotes, and oddities. The author, as he tells us in his preface, has been engaged for years in gathering them. He now gives them to the world in an attractive volume, copiously illustrated with apt drawings from his own pen. His incidents have each an appropriate heading, and these are assembled in the Table of Contents, and there is also a general index. Thus all the stories, in their wide variety, may be readily found when needed to adorn a tale or enliven a speech.

Most of the items here are merely funny—more or less so, as the case may be; but in a chapter entitled Uncommon Law we find some interesting bits of ancient lore. How many of us know how a convicted felon established his right to benefit of clergy? Mr. Duncan tells us. All he need do was to show that he could read the first three words of the Fifty-first Psalm in the Vulgate—Miserere Mei Deus. This crucial test acquired the name of the "neck verse," because so many thousands saved their necks thereby. One can surmise that there was some assiduous memorizing in the underworld.

—Arthur M. Brown.

Boston, Massachusetts.

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*The Canadian Law of Trade Marks and Industrial Designs* (including the Law of Trade Names and Unfair Competition), by Harold G. Fox. 1940. Toronto: The University of Toronto Press. Pp. LXVIII, 700. The author's Preface indicates that this book was intended to afford a convenient reference text for practical use in connection with questions relating to the current Canadian law of trademarks and the allied matters designated in the title. The aim is well fulfilled. The scope of the work goes far beyond a mere statement of the present law. The first chapter consists of an "Historical Introduction" which is an interesting general discussion of the development of trademark law, in both theory and practice, from the purposes of the earliest known marks to the theory of protection which was attempted to be expressed by the Unfair Competition Act of 1932. This historical approach sets the key-note for much of the succeeding material.

In the discussion of numerous provisions of the 1932 Act, their foundation has been established and their intent clarified by reference to source material. Such discussion is extremely helpful because of what Mr. Fox frankly admits are the many imperfections of that Act. He has frequently turned to the previous Canadian Act and to the British Trade Marks Acts to indicate the source or trace the development of the present provisions. Many of these references furnish an authoritative—sometimes the only—guide by which the intent of particular provisions may be determined "notwithstanding the fog in which the meaning of the text is enveloped."

The discussion is copiously annotated with both Canadian and British cases. Incidentally, it is surprising how many of them are close counterparts of cases

which have been brought before the United States courts. A student of the general development of the law of trademarks and unfair competition should find of fascinating interest a comparative study of such decisions. To return to the present book, however, Mr. Fox has not hesitated to use actual and occasionally lengthy quotations from the cases cited whenever the quotations serve to give a judicial definition of a doubtful term, to illustrate the application of a general provision to a particular circumstance, or to clarify the reason for an established principle. Indeed, throughout the book he has generally given, not his own conclusions, but judicial expressions as to the meaning and interpretation of dubious points.

A cursory glance at the Table of Contents suffices to show how thorough the author has been in making some reference to every phase of the questions with which he deals. Only by study of the contents themselves, however, can one appreciate the meticulous care with which he has outlined special provisions and special circumstances. This care has resulted in a work which, while of course not achieving the impossible perfection of supplying an exact answer to every question which may confront a lawyer in this field, should at least put him a step forward in the right direction.

The section of the book dealing with "industrial designs" calls for a special note. There is in the United States no statute directly corresponding to the Canadian Design Act. Perhaps our closest equivalent is in our provisions for design patents; but in discussing the Canadian Act Mr. Fox specifically points out that "a registered design is not in any way a minor type of patent." This section may therefore be particularly commended to anyone who has suffered the inevitable confusion resultant from an attempt to assimilate an "industrial design" to our own trademarks, design patents, or copyrights.

The concluding pages of the book are devoted to a very complete Appendix, containing among other material the text of various Canadian statutes, the text of the International Convention to which both the United States and Canada are parties, regulations and forms relating to registration under the present Unfair Competition Act, and suggested forms for various types of litigation. The addition of this material greatly enhances the usefulness of the book to the American practitioner who deals only occasionally with Canadian matters.

—L. B. STOUGHTON.

New York City.

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*State Law Index.*—An index to the Legislation of the States of the United States enacted during the Biennium 1937-1938. Seventh Biennial Volume. Government Printing Office. Washington, 1940. Pages vii, 700.—This index covers the enactments of 56 regular and 39 extra sessions of state and territorial legislatures, and indexes 11,434 acts and resolutions of a general character, while omitting more than 12,000 acts and resolutions of a private, local or temporary character. The mass of state legislation is indicated by the fact that the seven volumes of state law indexes for the period from 1925 to 1938 cover 576 volumes of state session laws. This and earlier volumes of the series were compiled by the Legislative Reference Service of the Library of Congress under the direction of Miss Margaret W. Stewart.

The present volume and that for the immediately preceding biennium are merely indexes, whereas the first five volumes covering 1925 to 1934 also contained valuable topical digests of the state laws that were indexed. It is to be regretted that these digests have not been continued, although the index alone is of distinct value and makes it readily possible for the user to find state legislation in which he is interested.

The volume for 1937-1938 was not published until 1940 and cannot be used as a guide to current legislation, but delay in the publication of such a volume is unavoidable because many state session laws are not immediately available, and the preparation of an index is a lengthy and difficult task. Even though delayed, the index is, however, of distinct value.

—WALTER F. DODD.

Chicago.

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# LAWYERS AND NATIONAL DEFENSE

By EDMUND RUFFIN BECKWITH
of the New York Bar

THIS GREAT AUDIENCE, listening now to hundreds of broadcasting stations throughout the country, can hear the voice of one man in a single instant of time because the men and women who operate what we call the magic of radio are willing to work together whenever some matter of great public importance requires it. To the Columbia Broadcasting System and the many stations associated with it for this program, I convey the thanks of the American Bar Association and of its Committee on National Defense for this opportunity to tell so many people about a matter that lies close to the hearts of all of us.

### General Subject

My general subject is the work that lawyers are doing in an organized way through their bar associations and committees for the national defense. Many things are going on, interesting and important things, and I hope that you will wish to hear about them on some other occasion in the near future. There is time now for only one. I shall tell you what is being done to make the advice and services of lawyers available to the men in the Army and Navy, the Marine Corps and the Coast Guard, to women in the Services like the Army and Navy Nurse Corps, the men who are going to be called up for training under the Selective Service law, and to the families and dependents of all those men and women.

Now that is a very great number of people in many different groups, and some of them are everywhere, training and working to defend and protect us all. I am going to refer to them simply as the men in the Armed Forces and their families. Many of them, perhaps nearly all, will have in their minds at one time or another some question about the law. It is the business of lawyers to know how to answer those questions, and it is the duty of the bar associations to see that the answers are available promptly and properly in all respects. So, in the first place, let us look at some of the legal questions that may come up and the people who may be concerned with them; then I shall tell you about the organization and work of the bar, and how to take advantage of the services it is prepared to perform.

### Services of Bar Associations

We anticipate every kind of question you can think of: about family relationships, especially the guardianship and care of children; about homes and personal possessions, wages and other income, things bought on installments, taxes and other debts; about rights under wills and insurance policies, welfare laws and civil service; about accidents and other sudden misfortune. Some of these questions will call only for advice, some for letters to be written, some will require legal papers, and there will be cases that have to be tried in the courts. For the men who are registered for Selective Service there may be questions about their classification, and sometimes when a man is far from home in camp or on shipboard in some distant ocean a matter affecting his civilian affairs or his family may suddenly need attention.

It is easy to see that such a situation, affecting so many people who are serving our country in its Armed Forces or preparing to do so, cannot be left to work itself out as it does in ordinary, peaceful times. It is not only true that those men and women are entitled to have their affairs properly attended to in their absence, but it has seemed to us who have been planning and arranging the special organization of the bar that they are entitled to be as free as possible from worry and to know that their rights and their families will be protected;—because, when all is said and done, the first duty and high privilege of the legal profession is to protect civil rights of a free people.

### Organization of the Bar

To understand the organization of the bar we should remember that in every one of the 3070 counties in the United States there is at least one Advisory Board for Registrants, with many more where they are needed, making altogether about 6000. Nearly all these boards were at first composed of three lawyers with the power to add associate members as their work requires. They are expected to advise registrants about their questionnaires, but they go beyond that and try to help with every kind of question; and this is not all, because even though we do not count any lawyers who are serving on local or appeal boards or as appeal agents or the large number who are themselves in the Armed Forces, we find that in addition to the Advisory Boards in the larger towns and cities there are many legal aid societies and special committees of the local bar associations. All of these thousands of practicing lawyers, men and women, are doing the work that we think in the present emergency is a great public duty of the bar.

Then there is in every state a committee on national defense which has been created by the state bar association to keep in touch with the local work, and for another very special purpose which I shall come to later; and so on through some other steps to the Committee on National Defense of the American Bar Association, with its headquarters in Washington, which is concerned with finding out what the legal profession can best do to serve the public interest, and then helping to get it done.

*An address delivered over the Columbia Broadcasting System and associated stations, April 22, 1941. The author is Chairman, Committee on National Defense of the American Bar Association.

### Soldiers' "Manual of the Law"

One of the first things this Committee did was to write, and give to the Government for public use, "A Manual of Law." It contains the essential things to know about the Soldiers' and Sailors' Civil Relief Act, the Selective Training and Service Act, and some other recent legislation. The Selective Service System printed 200,000 copies of the Manual at the Government Printing Office, and sent one to each member of a board. We believe that this work has made it much easier than it would have been for everyone to find out what his rights are under these new laws, and we shall prepare a new edition whenever it is needed.

### How Service Functions

Now let us see where we are. We have talked about the many kinds of legal questions that may come up and how the lawyers are organized to take care of them, but we have not found out how the two get together. The fact is that it may happen in any one of three ways. A man who is still at home may go directly to some lawyer with whom he is acquainted or to his Advisory Board or a local committee of the bar association or the legal aid society. He will know where to go or he can find out very easily because he is at home. But suppose that after he has left his home he hears of some legal matter there which concerns his family or he has some personal problem where he is. To meet such situations the Army and the Navy have arranged it so that in every camp and station there is an officer assigned to see that such questions are attended to. Whenever he is requested to do so, the officer may consult a lawyer in the vicinity or he may make an appointment for an interview with the lawyer by the man himself. That generally depends upon how complicated the matter is, because very often a telephone call is sufficient. After the lawyer has been consulted he will know whether to write back to the man's home, and if necessary another lawyer there will take hold.

So, as you see, if it is the man himself who wants legal advice he can get it wherever he is. But there is one other possible way of raising a legal question and that is for some member of a family of an absent man to do it without informing him. Suppose the man is in camp across the country, or in Panama guarding the Canal, or on a Naval vessel, and his wife or mother does not wish to distress or alarm him but she needs the friendly advice or perhaps the strong protection of a competent and courageous lawyer, and suppose that instead of inquiring at home she writes to Washington. To deal with a case like that we have arranged with the Army and Navy that when they hear about it they will refer it to the Committee on National Defense in the proper state, or in some circumstances it may come to our headquarters in Washington. In any event, it will be put in the hands of a lawyer who will do his best, and the state committee will help him if necessary.

### Cost of Service

That is the great plan. It is complete and it is working successfully. If we see that it needs to be extended or that it can be improved, we are ready to take the necessary action. And that brings us to ask, who pays for it?

Well, the lawyers themselves are paying the cost of the organization and giving their time to it, traveling, writing letters and technical papers, contributing the services of their offices and their employees. With regard to charges for the work done for men in the Armed Forces and their families, there are three types of situation. When clients are able to pay a reasonable fee they will naturally expect to do so; but no charge can be made for advice and assistance respecting the questionnaires and other papers incident to the processes of Selective Service prepared on behalf of registrants or their dependents; and no charge for any other advice or services is proper if the applicant is unable to pay.

### ABA Defense Headquarters

The whole bar of the country wishes to make certain that everywhere and at all times this great undertaking shall be well done. The Committee on National Defense for which I have the honor to speak has its headquarters in the Hill Building, Washington. A letter or telegram addressed simply to the American Bar Association, Washington, D. C., will reach us. It is our duty to know what is needed, to study the best methods, to make plans and to attend to complaints if unhappily any should come to us.

We have recently prepared a pamphlet which describes this work and some other plans. We call it simply "Memorandum No. 3." It costs us three cents to print and mail a copy. We will be glad if you will send us a three-cent stamp and ask for it. We want every man and woman in the United States to know what we are trying to do—what the bar with all its public spirit and sincerity wants to see well done. We will welcome suggestions from the public.

### Responsibility of Lawyers

The profession of the Law is responsible for the administration of justice, to the end that all men's legal rights shall be jealously protected; it includes as well a certain skill and power to recognize the mutual rights of free men, to share in a special way in their high ability and their noble willingness to work for and with each other, in mutual confidence and courage, for the eternal preservation of their liberties.

The organized bar intends to put at the service of the people in these troubled times its whole capacity for freedom and for justice, in particular and in general; in particular for the assistance and comfort of the men in our Armed Forces and their families; in every way for the protection of those precious institutions which have come from the bravery and wisdom of the past into the happy keeping of our people and which we all now hold in sacred trusteeship for our posterity.

# PROFESSIONAL ETHICS COMMITTEE

### OPINION No. 210
### Filed March 15, 1941

**SOLICITATION—It is not improper for a lawyer to advise a client whose will he has drawn of changes in fact or law which may defeat the testamentary purpose expressed in the will.**

**A member of the American Bar Association calls attention to the effect on testamentary dispositions of subsequent changes in general economic conditions, of changes in the attitude or death of named fiduciaries in a will, of the removal of the testator to a different jurisdiction where different laws of descent may prevail, of changes in financial conditions, family relationship and kindred matters, and then inquires whether it is proper for the lawyer who drew the will to call attention of the testator from time to time of the importance of going over his will.**

The committee's opinion was stated by MR. HOUGHTON, Messrs. Phillips, Drinker, Brown, Miller, Brand, and Jackson concurring.

The inquiry presents the question as to whether such action on the part of a lawyer is solicitation of legal employment and so to be condemned.

Many events transpire between the date of making the will and the death of the testator. The legal significance of such occurrences are often of serious consequence, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest.

It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will.

Periodic notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to reexamine his will to determine whether or not there has been any change in his situation requiring a modification of his will.

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### OPINION No. 211
### Filed March 15, 1941

**FEES FOR ADVICE AND SERVICE TO REGISTRANTS UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF 1940—CANON 12—(1) Legal advice to registrants with respect to questionnaires, claims, and like matters should be made by members of advisory boards without charge.**

**(2) Other legal services to persons in the military, naval, or marine service, or their dependents, who are unable to pay for such advice should be rendered without charge by legal aid organizations or by members of the bar.**

**(3) A reasonable fee should be charged for other legal services to persons in the military, naval, or marine service, or their dependents, whether rendered by members of advisory boards or other lawyers.**

**SOLICITATION OF PROFESSIONAL EMPLOYMENT—CANON 27—Members of advisory boards should not utilize their official relationship to obtain professional employment.**

The Committee on National Defense of the American Bar Association has asked us to amplify our Opinion No. 206, respecting charges that may be properly made for legal services falling in the following categories:

(1) Legal advice to registrants under the Selective Training and Service Act of 1940, and their dependents strictly with respect to the processes under the Act, such as questionnaires, claims, and like matters, by members of advisory boards.

(2) Other legal services to persons in the military, naval, or marine service, or their dependents, who are unable to pay for such services.

(3) Other legal services to persons in the military, naval, or marine service, or their dependents.

The opinion of the Committee was stated by MR. PHILLIPS, Messrs. Houghton, Miller, Drinker, Brown, and Brand concurring. Mr. Jackson was not present.

Legal advice falling in the first category rendered by members of official advisory boards must be made without charge.

Legal services falling in the second category, whether made by advisory boards, legal aid organizations, or like organizations, or by other members of the bar, should be rendered without charge, and services should not be denied because the person needing such services is unable to pay therefor.

With respect to legal services falling in the third category, whether rendered by members of advisory boards or other lawyers, reasonable fees may be properly charged therefor.

Members of the advisory boards should exercise great care to conform to the standards of ethical conduct in their professional relations with persons in the military, naval, or marine service falling in the third category. They should not be prohibited from accepting employment. Neither should they utilize their official relationship to obtain professional employment.

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### OPINION No. 212
### Filed March 15, 1941

**BROADCASTING OF COURT PROCEEDINGS—Disapproved as violative of Judicial Canon 35.**

**Canons involved: Judicial Canons 21 and 35. Opinion referred to: 67.**

A radio station proposes to broadcast the proceedings of a local police court. A member of the court, doubtful of the propriety of such broadcasting, has requested the opinion of this committee thereon.

The committee's opinion was stated by MR. BRAND, Messrs. Phillips, Drinker, Brown, Houghton, Miller, and Jackson concurring.

In Opinion 67 (1932) we held that broadcasting of court proceedings was improper. The proposed broadcasting is now specifically condemned by Judicial Canon 35:

> "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."[1]

The letter of inquiry refers to the broadcasting of traffic court trials in Detroit, Michigan, some years ago. Prior to the adoption of Judicial Canon 35, the Ethics Committees of the State Bar of Michigan and the Detroit Bar Association jointly considered the ethical problem presented by such broadcasting. After a public hearing of those who advocated the broadcasting as a medium of safety education, the committees disapproved such broadcasting. (Opin-

1. Canon 35 was adopted September 30, 1937, upon the recommendation of the Judicial Section of the American Bar Association.

ion I, January, 1937.) As a result, the broadcasting was promptly discontinued. We quote, with approval, from the opinion of the committees:

". . . The Committees are of the opinion, however, that such work is not the proper function of the Court.

"Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. In answer to the statement that those who voice an objection are not required to submit to a trial which is broadcasted, it is only necessary to point out that some might hesitate to object for fear of prejudicing the Court, notwithstanding that such fear might be entirely unfounded. Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may have upon the radio audience."

To this we add:

"A judge should adopt the usual and expected method of doing justice, and not seek to be . . . spectacular or sensational in the conduct of the court." (Judicial Canon 21.)

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### OPINION No. 213
### Filed March 15, 1941

**ADVERTISING—It is not improper for a lawyer to advise his regular clients of new statutes, court decisions, and administrative rulings which may affect the client's interests, but any communications of that nature from the lawyer should be confined to clients by whom the lawyer is regularly and customarily retained in matters of such a nature that the communication is relevant.**

**ADVERTISING — PRINTED BULLETIN—While it is more dignified and better taste to communicate such information by letter, it is not inherently unethical to use a printed bulletin which is sent only to regular clients and is confined to information regarding new statutes, court decisions, and administrative rulings which might affect the client's interests.**

A firm of patent lawyers publishes and circulates periodically a printed bulletin, captioned with the letterhead of the firm but entitled "Law News Bulletin," purporting to summarize the significant features of current legislation, administrative rulings, and important court decisions in the patent field. The opinion of this committee has been requested as to whether it is proper for the firm in question to send such bulletin (a) to its clients and (b) to concerns and individuals who are not clients.

The opinion of the committee was stated by MR. BROWN, Messrs. Phillips, Drinker, Houghton, Miller, and Brand concurring. Mr. Jackson was absent.

It certainly is not improper for a lawyer to advise his regular clients of new statutes, court decisions, and administrative rulings, which may affect the client's interests, provided the communication is strictly limited to such information. The usual means of communicating such information is by ordinary letter, which could well be multigraphed or mimeographed if the clients are numerous. While the committee deems a letter more dignified and in better taste than a printed bulletin or circular, it cannot be said that there is any ethical distinction between the two. Any such communication should be restricted to clients by whom the lawyer is regularly and customarily retained in matters of such a nature that the communication is relevant.

When such communications go to concerns or individuals other than regular clients of the lawyer, they are thinly disguised advertisements for professional employment, and are obviously improper. See Opinions 73 and 120 relating to analogous, though dissimilar, circulars purporting to explain the divorce laws of a particular state.

As recently pointed out by this committee, patent lawyers are as amenable to the provisions of the Canons of Ethics as other lawyers. See Opinion 203.

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### OPINION No. 214
### Filed March 15, 1941

**SOLICITATION—ADJUSTERS—Arrangement between a firm of lawyers and another lawyer for display of the latter's name as "Adjuster" on the firm stationery and office door, solicitation of adjustment business by the adjuster, and his recommendation of the law firm for handling resulting legal work, is disapproved as violative of Canon 27.**

**Canon involved: 27.**

**Opinions referred to: 96, 159, 183.**

A lawyer whose activities are limited to the adjustment of insurance claims has come into the office of a law firm under an arrangement whereby, under his own name as an "adjuster," he solicits and handles adjustment work, recommends the law firm for employment where legal services are required, and has his name on the office door and on the stationery of the law firm with the designation "adjuster." Inquiry is made as to the propriety of the arrangement.

The opinion of the Committee was stated by MR. BRAND, Messrs. Phillips, Houghton, Drinker, Brown, and Miller concurring. Mr. Jackson was absent.

Whether the adjuster is a partner or an employee, the solicitation of the adjustment work would offend against Canon 27, which provides:

"It is unprofessional to solicit professional employment by circulars, advertisements, through touters, or by personal communications or interviews not warranted by personal relations."

The use of the description "adjuster" on the office door and stationery of the law firm is improper.[1]

In Opinion 96 the lawyer who accepted employment from the adjuster who had solicited the handling of an insurance claim adjustment was not found to have had knowledge of the fact of solicitation. That, of course, could not be said of the proposed arrangement involved in the present inquiry.

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### OPINION No. 215
### Filed March 15, 1941

**CONFLICTING OBLIGATIONS—A judge's membership in the National Guard or Officers Reserve Corps does not create such an inherent conflict of obligations as to arbitrarily forbid such membership; any implication to that effect in Opinion 22 is overruled.**

The Committee has been asked to reconsider its Opinion 22, wherein it is stated: "The committee disapproves of membership in the National Guard or Officers Reserve Corps by one holding judicial office. The offices of judge and of soldier belong to different departments of government, one being judicial and the other executive in its nature, and might easily involve conflicting obligations."

The Committee's opinion was stated by MR. MILLER, Messrs. Phillips, Drinker, Brown, Houghton, and Brand concurring. Mr. Jackson was absent.

Opinion 22 was given in answer to a question which concerned a judge of a state, the constitution of which provided in part that "such judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States, during the term

1. Opinions 159 and 183, respectively, condemned the display of the words "medical-legal law" and "Medical Jurisprudence" on the stationery of a lawyer who was also a duly licensed physician.

of office for which such judge shall be elected."

In Opinion 63 we state: "The committee does not express opinions concerning questions of law." It is not our province to interpret constitutions, statutes, or principles of law. We are limited to the interpretation of the canons of ethics.

Where the law permits a judge to be a member of the National Guard or the Officers Reserve Corps, the committee, as now constituted, is of the opinion that the statements made in Opinion 22 are too broad. Upon reconsideration, we now hold that it is not inherently improper for a judge to be a member of either organization.

Judicial Canon 24 provides:

> "A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

Opinion 22 states that a judge's membership in the National Guard or Officers Reserve Corps might easily involve conflicting obligations. We still recognize such possibility. If conflicting obligations in fact exist and cause interference with the judge's devotion to his judicial duties, then he must choose between the two positions and forego one or the other.

However, it is also possible that the judge might be able to contribute to National Defense through his membership in the National Guard or Officers Reserve Corps without interfering with the discharge of his judicial duties. When that is the fact, there is no impropriety in his holding the two positions.

Accordingly, we now determine that the answer to the ethical question depends upon the facts of each particular case. No arbitrary rule of inherent impropriety can be stated.

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**OPINION No. 216**
**Filed March 15, 1941**

**LAWYER AND CLIENT—CONFIDENTIAL COMMUNICATIONS—Where a communication was made to a lawyer under facts which present a fairly debatable question as to whether the relation of lawyer and client existed at the time of the communication, it is not unethical for the lawyer to treat the communication as confidential. See Canon 37.**

H and W were husband and wife, respectively. W was guilty of adultery. H learned of W's misconduct and charged her therewith. She confessed she no longer cared for H, that she had already employed X, a lawyer, to obtain a divorce from H, and that she desired the divorce, even though no grounds therefor existed, on the ground of cruelty. X sent a written request to H to appear at X's office. X told H that W desired a divorce and that he would proceed to obtain it if H would not contest the suit. X stated that he would see to it that no counsel fees nor alimony was awarded, and that certain jewelry would be returned to H on entry of the final decree. X procured two written statements, one signed by H agreeing not to contest the suit, and one signed by W agreeing not to ask for counsel fees or alimony. X agreed to keep both statements to insure compliance therewith.

After the divorce suit was instituted and before entry of the decree, H met Q, a duly licensed and practicing lawyer, who was a friend of H. H related the above statement of facts to Q and requested him to give him some friendly advice. Q told H that H, W, and X were acting foolishly and that H should have no part in the collusive agreement and fraud.

Q neither advised the court in which the divorce suit was pending, nor any disciplinary body, of the facts related to him by H. We are asked if Q's failure to make disclosure was unethical.

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Brown, Houghton, Miller, Drinker, Brand, and Jackson concurring.

Communications between lawyer and client are privileged.[1] The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser.[2] The privilege applies to communications made in seeking legal advice for any purpose.[3] The mere circumstance that the advice is given without charge therefor does not nullify the privilege.[4]

Here, there was no formal relation of attorney and client and no contemplation that a fee would be charged or paid, but H sought legal advice from Q, a duly licensed and practicing lawyer, and made full disclosure of the facts to Q, and Q complied with the request by giving legal advice to H.[5]

1. Wigmore on Evidence, 3d Ed., Vol. 8, §§ 2290-2329.
2. Wigmore on Evidence, 3d Ed., Vol. 8, § 2290, p. 548.
3. Wigmore on Evidence, 3d Ed., Vol. 8, § 2294, p. 563.
4. Wigmore on Evidence, 3d Ed., Vol. 8, § 2303.
5. See 7 C. J. S. § 65 pp. 848, 849; *Hirsch Bros. & Co. v. R. E. Kennington Co.*, 155 Miss. 242, 124 So. 344, 88 A. L. R. 1, 6.

# NOMINATING PETITIONS

## Notice by The Board of Elections

IT HAS BEEN impossible for the JOURNAL to withhold publication of this issue until after May first at 5:00 P. M., which is the final date for receipt of all petitions placing names in nomination for State Delegates to be elected this spring. The Board of Elections is therefore unable to announce a summary of the results of the nominations at this time. Attention is called, however, to petitions which appeared in the March and April issues, as well as those which follow.

Ballots will be mailed before May 31 to members in good standing in the eighteen jurisdictions holding elections. Full instructions for voting will accompany the ballots.

Edward T. Fairchild,
Chairman.

*In the interest of conserving space in the* JOURNAL, *the names of only fifty signers to any nominating petition are being published by suggestion of the Board of Elections.*

### California

*To the Board of Elections:*

THE undersigned hereby nominate Guy Richards Crump, of Los Angeles, for the office of State Delegate for and from the State of California:

Messrs. John Perry Wood, Ernest S. Williams, Wm. C. Mathes, Loyd Wright, Maurice Rogers, Emmet H. Wilson, Jr., Ben S. Beery, Emmet H. Wilson, Pierce Works, Henry M. Willis, Joseph L. Lewinson, Frank B. Belcher, Arnold Praeger, Norman A. Bailie, Charles E. Beardsley, T. B. Cosgrove, James A. Flanagan, Gordon F. Hampton, John E. McCall, Paul Fussell, James L. Beebe, Richard Fitzpatrick, Frederick W. Williamson, G. W. Nix, J. E. Simpson, Stanley N. Barnes, Frank P. Doherty, James L. Patten, Edward D. Garratt, W. P. Smith, Randolph L. Shinn, and B. J. Bradner, of Los Angeles;

Messrs. Charles A. Beardsley and A. T. Shine, of Oakland;

Mr. J. E. Brenner, of Palo Alto; and

Messrs. Delger Trowbridge, John P. Fryer, O. K. Cushing, Ben C. Duniway, William H. Gorrill, Charles S. Cushing, John Selby, Joe G. Sweet, C. J. Goodell, and John Francis Neylan, of San Francisco.

### Florida

*To the Board of Elections:*

THE undersigned hereby nominate Cody Fowler of Tampa for the office of State Delegate for and from the State of Florida:

Mr. T. F. Fleming, of Fort Lauderdale;

Messrs. Sam T. Dell, Jr., and J. Lance Lazonby, of Gainesville;

Messrs. Donald Kingery Carroll, F. P. Fleming, Charles Cook Howell, Charles Cook Howell, Jr., Austin Miller, Walter F. Rogers, and William H. Rogers, of Jacksonville;

Messrs. O. D. Batchelor, Frank E. Bryant, Bertram R. Coleman, David W. Dyer, Robert H. Givens, Jr., Paul L. E. Helliwell, Walter B. Humkey, George C. McCaughan, L. S. Julian, Paul D. McGarry, J. E. Yonge and Daisy Richards, of Miami;

Mr. Richard J. Gardner, of Quincy;

Messrs. Erle B. Askew, Lincoln C. Bogue, Mercer Brown, C. Frank Harrison, T. Frank Hobson, H. W. Holland, H. L. McGlothin, and Major L. Perry, of St. Petersburg;

Mr. J. Velma Keen, of Tallahassee; and

Messrs. M. Caraballo, Doyle E. Carlton, Chester H. Ferguson, William A. Gillen, W. F. Himes, K. I. McKay, Neil C. McMullen, L. L. Parks, H. S. Phillips, Harry N. Sandler, R. W. Shackleford, George T. Shannon, John B. Sutton, C. Fred Thompson, Morris E. White, C. Edmund Worth, and Hervey Yancey, of Tampa.

### Illinois

*To the Board of Elections:*

THE undersigned hereby nominate R. Allan Stephens, of Springfield, for the office of State Delegate for and from the State of Illinois, to fill a vacancy for the term to expire at the adjournment of the 1942 Annual Meeting:

Messrs. Charles P. Megan, Edgar B. Tolman, John C. Fitzgerald, John V. McCormick, Charles O. Loucks, William F. Clarke, Ralph S. Bauer, James J. Cherry, Silas H. Strawn, John D. Black, James H. Winston, Walter H. Jacobs, Webster H. Burke, Walter B. Smith, Frederic Burnham, Benjamin Wham, Alfred Beck, Irwin T. Gilruth, Paul M. Godehn, Herbert A. Friedlich, Frank D. Mayer, James P. Economos, Wm. Reeda, Jr., M. B. Kennedy, James F. Spoerri, James J. Magner, Elmer M. Leesman, Thomas J. Hoban, Grenville Beardsley, Clay Judson, Stuart J. Templeton, B. F. Langworthy, Herbert M. Lautmann, Louis P. Haller, Isaac E. Ferguson, Sidney S. Gorham, Jr., Willett N. Gorham, Herbert C. DeYoung, J. C. Lamy, Edward R. Adams, James B. Wescott, Roger Sherman, S. Ashley Guthrie, Nathan William MacChesney, Tappan Gregory, Henry A. Gardner, Alfred T. Carton, Erwin W. Roemer, and Miss Mary Hazel Crawford, of Chicago; and Mr. Cairo A. Trimble, of Princeton.

### Kentucky

*To the Board of Elections:*

THE undersigned hereby nominate Blakey Helm, of Louisville, for the office of State Delegate for and from the State of Kentucky:

Mr. Harry B. Mackoy, of Covington;

Messrs. William B. Gess and Alvin E. Evans, of Lexington;

Messrs. Henry E. McElwain, Jr., Thos. A. Ballantine, A. J. Carroll, Edw. A. Dodd, J. Verser Conner, Roy M. Shelbourne, F. M. Drake, W. J. Goodwin, Leo T. Wolford,

Wm. F. Clarke, Jr., Lafon Allen, J. Donald Dinning, Oldham Clarke, W. W. Downing, Frank J. Dougherty, John T. E. Stites, Marvin H. Taylor, James Garnett, Jr., Thomas J. Wood, Samuel S. Blitz, Andrew Duncan, Jr., Watson Clay, Samuel R. Wells, John C. Doolan, Howard D. Hunn, Wilson W. Wyatt, Herbert F. Boehl, Lawrence S. Leopold, Irvin Marcus, Arthur W. Grafton, James W. Stites, George A. Brent, Eli H. Brown, III, Richard Priest Dietzman, Nelson Helm, and Lorenzo K. Wood, of Louisville.

**Massachusetts**

*To the Board of Elections:*

THE undersigned hereby nominate Joseph F. O'Connell, of Boston, for the office of State Delegate for and from the State of Massachusetts:

Messrs. Frederic H. Chase, Robert Cutler, Francis J. W. Ford, John W. Cronin, Roger B. Coulter, David Stoneman, Frank L. Simpson, Barton Corneau, Willard B. Luther, Randolph Frothingham, Wm. F. A. Graham, James A. Herbert, Elias Field, Walter I. Badger, Jr., George R. Farnum, Elwood H. Hettrick, Homer Albers, Leland Powers, Frederick H. Davis, Kevin Hern, Eugene S. Kraetzer, Jr., and James P. Allen, Jr., of Boston;

Mr. Joseph L. Hurley, of Fall River;

Messrs. Henry G. Bowen, James H. Walsh, Jr., and Samuel M. Salny, of Fitchburg;

Messrs. Timothy M. Hayes and Henry P. Herr, of Greenfield;

Mr. Thomas Otis, of Hyannis;

Messrs. Louis S. Cox, Wilbur E. Rowell, Augustine X. Dooley, and Frederic S. O'Brien, of Lawrence;

Messrs. James J. Kerwin, John C. Leggat, William Sumner Kenney, and Melvin G. Rogers of Lowell;

Mr. Philip Barnet, of New Bedford;

Mr. Robert A. Welsh, of Provincetown;

Mr. John D. Mackay, of Quincy;

Messrs. Raymond T. King, Charles V. Ryan, Jr., James F. Egan, and Thomas C. Malley, of Springfield;

Messrs. W. Arthur Garrity, Charles C. Milton, Stephen S. Bean, Carl E. Wahlstrom, Florence J. Donoghue, and Robert W. Lewis, of Worcester.

**Missouri**

*To the Board of Elections:*

THE undersigned hereby nominate Ronald J. Foulis, of St. Louis, for the office of State Delegate for and from the State of Missouri:

Messrs. James A. Finch, James A. Finch, Jr., Lehman Finch, Rush H. Limbaugh, and R. B. Oliver, III, of Cape Girardeau;

Messrs. Roy W. Harper and Everett Reeves, of Caruthersville;

Messrs. James T. Britt, Frank H. Terrell, John W. Oliver, Byron Spencer, and Thomas R. Hunt, of Kansas City;

Mr. Robert C. Hyde, of Poplar Bluff;

Messrs. Forrest M. Hemker, Christian B. Peper, Edward Greensfelder, R. Forder Buckley, Robert Neill, Jr., Richard D. Shewmaker, Frank A. Thompson, Truman Post Young, Henry J. Kaltenbach, Jr., John M. Holmes, Wilbert C. Schade, Jr., and C. Sidney Neuhoff, of St. Louis;

Messrs. Warren M. Turner, Howard C. Potter, Louren G. Davidson, A. P. Stone, Jr., I. W. Schwab, J. R. Schweitzer, and Jack S. Curtis, of Springfield.

**Missouri**

*To the Board of Elections:*

THE undersigned hereby nominate Charles M. Hay, of St. Louis, for the office of State Delegate for and from the State of Missouri:

Messrs. Benson C. Hardesty, Rush H. Limbaugh, O. H. Knehans, I. R. Kelso, and W. J. Hunter, of Cape Girardeau;

Messrs. Albert Chandler, Henry A. Hoeffer, Edmond A. B. Garesche, Frank Y. Gladney, Arthur E. Simpson, S. D. Flanagan, C. F. Wescoat, Henry S. Caulfield, Isaac C. Orr, John B. Edwards, Thos. H. Cobbs, Geo. B. Logan, Oliver Senti, Joseph F. Holland, Chas. B. Williams, Robert L. Aronson, Edward M. Ruddy, Harry F. Russell, Wm. K. Koerner, B. T. Mattingly, Wm. S. Connor, Mark D. Eagleton, Robt. W. Hall, William P. Carleton, James F. Nangle, Clark M. Clifford, W. E. Moser, and Chas. E. Cullen, of St. Louis;

Messrs. Paul W. Barrett, W. D. Tatlow, Clarence O. Woolsey, F. M. McDavid, Frank B. Williams, John S. Farrington, Ben M. Neale, Charles F. Newman, Harry C. Jensen, Harry D. Durst, W. B. Linney, A. M. Curtis, Wm. L. Vandeventer, Irving W. Schwab, Edwin Carlton Haseltine, and Arthur W. Allen, of Springfield; and

Mr. Ralph F. Fuchs, of University City.

**Tennessee**

*To the Board of Elections:*

THE undersigned hereby nominate George H. Armistead, Jr., of Nashville, for the office of State Delegate from Tennessee for the vacancy now existing in the term to expire at the adjournment of the 1941 Annual Meeting:

Messrs. Harley G. Fowler, Jas. A. Fowler, S. F. Fowler, Forrest Andrews, Charles D. Snepp, W. Cecil Anderson, H. H. McCampbell, Jr., D. C. Webb, Thomas G. McConnell, J. W. Sullivan, Jr., R. R. Kramer, Robert T. Kennerly, and C. W. Key, of Knoxville;

Messrs. John J. Hooker, William C. Sugg, Thomas H. Malone, Ferris C. Bailey, A. P. Ottarson, Jr., Lindsey M. Davis, Carmack Cochran, Frank M. Farris, Jr., John K. Maddin, F. M. Bass, Jr., Geo. Gale, Cecil Sims, Fyke Farmer, Albert A. White, W. P. Cooper, Wm. F. Carpenter, Will R. Manier, Jr., David M. Keeble, Miller Manier, Garland S. Moore, Seth M. Walker, F. M. Bass, and F. A. Berry, of Nashville.

**Tennessee**

*To the Board of Elections:*

THE undersigned hereby nominate George H. Armistead, Jr., of Nashville, for the office of State Delegate

from Tennessee for the three-year term beginning at the adjournment of the 1941 Annual Meeting:

Messrs. Earl King, Jno. T. Shea, Clinton H. McKay, H. D. Minor, John S. Porter, Lee Winchester, Leo Bearman, Emmett W. Braden, W. B. Rosenfield, Sylvanus W. Polk, Chas. L. Neely, Millsaps Fitzhugh, J. H. Shepherd, Auvergne Williams, Thos. A. Evans, Marion G. Evans, W. Percy McDonald, Jno. W. Loch, A. O. Holmes, Phil M. Canale, Frank J. Glankler, Hamilton E. Little, John Vorderbruegge, J. W. Canada, Lowell W. Taylor, W. B. Rosenfield, Ceylon B. Frazer, A. L. Heiskell, Frank M. Gilliland, Herbert B. Moriarty, Robert M. Nelson, and Edward F. Barry, of Memphis;

Messrs. Lindsey Davis, George J. Gale, F. A. Berry, F. M. Bass, Carmack Cochran, A. P. Ottarson, Jr., Lawrence B. Howard, Fyke Farmer, A. G. Ewing, John Bell Keeble, Jr., Wm. F. Carpenter, W. M. Fuqua, John K. Maddin, J. Olin White, Miller Manier, Norman R. Minick, William C. Sugg, Seth M. Walker, and Chas. C. Trabue, of Nashville.

### North Dakota

*To the Board of Elections:*

THE undersigned hereby nominate Harrison A. Bronson of Grand Forks for the office of State Delegate for and from the State of North Dakota:

Mr. John Keohane, of Beach;

Messrs. Clyde L. Young, Geo. F. Shafer, Gordon Cox, Edward B. Cox, William S. Murray, and W. L. Nuessle, of Bismarck;

Messrs. Mack V. Traynor, Fred J. Traynor, and Myer Shark, of Devils Lake;

Messrs. H. A. Mackoff and Theodore Kellogg, of Dickinson;

Messrs. Herbert G. Nilles and George A. Soule, of Fargo;

Messrs. O. B. Burtness, Harold D. Shaft, Frank Kilgore, T. A. Toner, Carlton G. Nelson, Carroll E. Day, Hubert E. Nelson, O. H. Thormodsgard, and C. F. Peterson, of Grand Forks;

Mr. Aloys Wartner, of Harvey;

Messrs. John Knauf, C. S. Buck, Jr., and A. W. Aylmer, of Jamestown;

Mr. S. D. Adams, of Lisbon; and Mr. John F. Sullivan, of Mandan.

### Vermont

*To the Board of Elections:*

THE undersigned hereby nominate Olin M. Jeffords, of Rutland, for the office of State Delegate from Vermont for the vacancy now existing in the term to expire at the adjournment of the 1941 Annual Meeting:

Messrs. Geo. H. Thompson, and Almon I. Bolles, of Bellows Falls; Mr. Norton Barber, of Bennington;

Messrs. Osmer C. Fitts, Orrin B. Hughes, and Frank E. Barber, of Brattleboro;

Messrs. J. A. McNamara, H. A. Bailey, Leon D. Latham, Jr., A. Pearley Feen, Louis Lisman, Warren R. Austin, Jr., William H. Edmunds, J. H. Macomber, Jr., and Bernard J. Leddy, of Burlington;

Mr. Raymond B. Daniels, of Montpelier;

Mr. Paul F. Douglass, of Poultney;

Messrs. Asa S. Bloomer, John A. M. Hinsman, Harold I. O'Brien, Edwin W. Lawrence, Vernon Loveland, and Lawrence Jones, of Rutland;

Mr. Wm. R. McFeeters, of St. Albans;

Mr. Sterry R. Waterman, of St. Johnsbury;

Mr. Alban J. Parker, of Springfield; and

Mr. Charles B. Adams, of Waterbury.

### Vermont

*To the Board of Elections:*

THE undersigned hereby nominate Deane C. Davis, of Montpelier, for the office of State Delegate from Vermont for the three-year term beginning at the adjournment of the 1941 Annual Meeting:

Messrs. Geo. H. Thompson and Almon I. Bolles, of Bellows Falls;

Mr. Norton Barber, of Bennington;

Messrs. Osmer C. Fitts, Orrin B. Hughes, and Frank E. Barber, of Brattleboro;

Messrs. J. A. McNamara, H. A. Bailey, Leon D. Latham, Jr., A. Pearley Feen, Louis Lisman, Warren R. Austin, Jr., William H. Edmunds, J. H. Macomber, Jr., and Bernard J. Leddy, of Burlington;

Messrs. Raymond B. Daniels and Robert H. Ryan, of Montpelier;

Mr. Paul F. Douglass, of Poultney;

Messrs. Asa S. Bloomer, John A. M. Hinsman, Harold I. O'Brien, Edwin W. Lawrence, Vernon Loveland, Olin M. Jeffords, and Lawrence Jones, of Rutland;

Mr. Sterry R. Waterman, of St. Johnsbury;

Mr. Alban J. Parker, of Springfield; and

Mr. Charles B. Adams, of Waterbury.

# INDIANAPOLIS MEETING

## *September 29 to October 4*

THE Sixty-fourth annual meeting of the American Bar Association will be held at Indianapolis, September 29 to October 4, 1941. Further information about the meeting will be given in the JOURNAL from time to time. The usual Advance Program will be sent out to members.

### Indiana Gets Ready

Emphasizing that the 64th Annual Meeting of the American Bar Association is open to every lawyer in the state, regardless of membership in any organization of the bench or bar, H. Nathan Swaim, chief justice of the Indiana Supreme Court, strongly urges a full participation by Indiana's legal profession in the great national meeting next September when leaders of the bench and bar will gather in Indianapolis. If you belong to Indiana's legal profession you belong at the convention, is the way this point is summarized by Judge Swaim, whose letter to the General Committee follows:

"Dear Mr. Beckett:

"The members of the Supreme Court are all impressed with the splendid work which you and the members of your committees have been doing in preparation for the annual meeting of the American Bar Association. We recognize the fact that you are all busy men and that it is a real sacrifice for you to give so much time and energy for this cause.

"We realize that this work is being done by you for the benefit of every member of the legal profession in Indiana. We also realize that for this work to result in a meeting of which we may all feel justly proud, it will be necessary for you to expend a substantial amount of money, and that the sooner you know approximately how much you will have available for the expense of this meeting, the more wisely you may plan therefor. With these thoughts in mind, each of us expects to make a contribution to this fund within the next few days.

"We all sincerely hope that your work meets with success and that all of the members of the bench and bar give you their whole-hearted support."

Yours truly, H. Nathan Swaim

### Entertainment Program

The magnitude of the job assumed by the various statewide committees in charge of plans for the American Bar Association meeting can be realized by a preview of the entertainment features outlined before the General Committee at its meeting a week ago by Mrs. Clarence R. Martin, Theodore L. Locke, and Harry C. Gause.

These include an exhibition race at The Speedway, an evening of music by a symphony orchestra, several trips to interesting points in Indiana, several dinners for both men and women, a number of luncheons and receptions for the women.

It is emphasized that all entertainment features are free to everyone attending the sessions of the national meeting. Registration likewise is free. When anyone registers he is given a series of reservation tickets from which he may choose those affairs he will want to attend. This privilege also is extended to the wives of the lawyers who register. The only limitation is in the number of persons it may be possible to accommodate at any one function or trip.

### Hotel Accommodations

*Official Headquarters—Claypool and Lincoln Hotels*

Hotel accommodations, all with private bath, are available as follows:

| | Single for 1 person | Double (Dbl. bed) 2 persons | Twin-beds for 2 persons | Two-room suites (Parlor and 1 bedroom) |
|---|---|---|---|---|
| Antlers (750 N. Meridian) | $3.00–3.50 | $4.50–5.00 | $4.50–6.00 | |
| Claypool (Wash. & Ill. Sts.) | 3.50 | 4.50–5.00 | | |
| (Advance reservations have already exhausted twin-bed rooms and suites.) | | | | |
| Columbia Club (Monument Circle) | 3.00–4.50 | 6.00–6.50 | 5.00–7.00 | |
| Harrison (Capitol & Market) | 3.00–3.50 | 4.50–6.00 | 6.00 | |
| Indianapolis Athletic Club (350 N. Meridian St.) | 2.75–4.00 | | 6.00 | |
| Lincoln (Wash. & Ill.) | 3.00–4.00 | 4.50–6.00 | | |
| Marott (Apt. Hotel) (2625 N. Meridian) | 3.00 | 6.00 | 6.00 | 7.00–9.00 |
| Severin (201 S. Illinois) | 2.50–3.50 | 4.50–5.00 | 5.00–7.00 | 10½-11½ |
| Spink Arms (410 N. Meridian) | 3.00 | 5.00 | 6.00 | 7.00 |
| Warren (123 S. Illinois) | 3.00–4.00 | 4.50–6.00 | 5.00–7.00 | |
| Washington (34 E. Washington) | 3.00–4.50 | 4.50–5.50 | 5.50–6.00 | 8.00 |

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

## Statute Draftsman's Manual

*(Continued from page 310)*

"material needed a substantial part of the section will remain in its present location, then revisor A may take what he must have, and the file should show precisely what he has taken so that the latter need not incorporate what revisor A has already taken from him.

(13) All work must be proof-read three times.

### Revision Notes

(1) In every case note specifically the source of each revised section and the reasons for the revision.

(2) Where several sections are consolidated, it is wise to note in the bill where each portion came from by reference to the old section number.

(3) The revision notes should be sufficiently complete so that they may be used in conferences with the legislative committees.

(4) List separately all provisions that will become obsolete in the future, with a note as to the approximate date they will become obsolete.

(5) List separately all cases in which procedure could be made uniform, or in which the statutes need modernizing by substantive revision.

### General Rules

(1) Be on the watch for conflicting powers and duties of officers and boards.

(2) Check carefully provisions as to compensation of public officers by salaries or fees.

(3) Keep in mind the possibility of using general statements of powers for public boards or bodies, with stated limitations, rather than granting only a specified list of powers which may be very lengthy and detailed.

(4) Delete provisions for specific penalties where general penalties cover the same matter.

(5) Use great care in making changes, even in form, in the sections that deal with estates in real property, alienation, descent and wills, and domestic relations."

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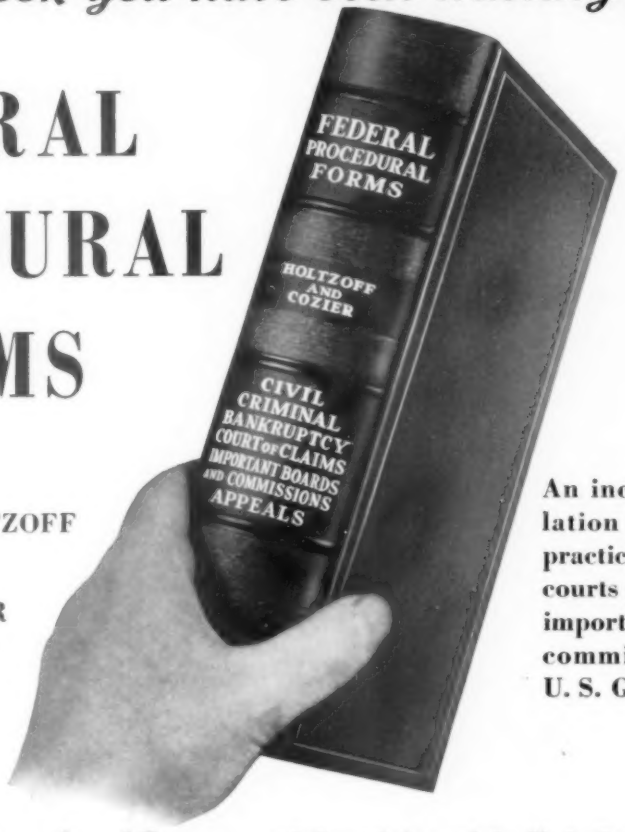
# FEDERAL PROCEDURAL FORMS




*By* ALEXANDER HOLTZOFF
Special Assistant to the Attorney General

*and* ALLEN R. COZIER
Special Attorney in the Department of Justice

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### IMPORTANT NOTE

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